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WILCOX & CO.

1235 No. 3384

United States
1235
Circuit Court of Appeals

For the Ninth Circuit.

NEIL GUINEY,

Appellant.

vs.

R. P. BONHAM, as United States Inspector in Charge of Immigration for the District of Oregon,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Names and Addresses of Attorneys of Record.

GEORGE F. VANDERVEER and RALPH S. PIERCE, 607 Central Building, Seattle, Washington,

For the Appellant.

BERT E. HANEY, United States Attorney, and BARNETT H. GOLDSTEIN, Assistant United States Attorney, Old Postoffice Building, Portland, Oregon,

For the Appellee.

Citation on Appeal.

United States of America,
District of Oregon,—ss.

To R. P. Bonham, Respondent, GREETING:

WHEREAS, Neil Guiney, complainant, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, Oregon, in

said District, this 23d day of July, in the year of our Lord, one thousand nine hundred and nineteen.

[Seal] CHAS. E. WOLVERTON,
Judge.

Due service of the above citation admitted this 23d day of July, A. D. 1919.

BARNETT H. GOLDSTEIN,
Attorney for Respondent,
Asst. U. S. Atty. [1*]

[Endorsed]: No. 8457. 23–195. United States District Court, District of Oregon. In the Matter of the Application of Neil Guiney for a Writ of Habeas Corpus. Citation on Appeal. Filed July 23, 1919. G. H. Marsh, Clerk. By K. F. Frazer, Deputy Clerk.

In the District Court of the United States for the District of Oregon.

March Term, 1919.

BE IT REMEMBERED, that on the 13th day of June, 1919, there was duly filed in the District Court of the United States for the District of Oregon a petition for writ of habeas corpus, in words and figures as follows, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Oregon.

In the Matter of the Application of NEIL GUINEY for Writ of Habeas Corpus and Ancillary Writ of Certiorari.

Complaint.

To the Honorable ROBERT S. BEAN, one of the Judges of the Above-entitled Court:

Comes now Neil Guiney, petitioner herein, by George F. Vanderveer, his attorney, and complains and alleges as follows:

1. That for more than six years last past your petitioner has been continuously a resident of the United States of America, engaged in pursuing as a means of livelihood his vocation as a logger and river driver.

2. That on or about the 20th day of February, 1919, your petitioner was arrested by R. P. Bonham, United States Inspector in Charge of Immigration for the District of Oregon, in obedience to the mandate of a warrant of arrest issued by the Secretary of Labor of the United States, wherein your petitioner is accused of having been found within the United States advocating the unlawful destruction of property and directing that an inquiry be had before a United States Inspector to determine the merits of said charge. That in pursuance of the mandate of said warrant a hearing was had before a United States Inspector of Immigration to in-

quire into said charge, whereupon your petitioner was informed that the additional charge had been filed against him, to wit, that he was a member of an organization, namely the Industrial Workers of the World, which organization advocated the destruction of property, the overthrowing of organized government and the [3] commission of acts of violence, and to sustain the charge contained in said warrant of arrest as so amended and enlarged, said United States Inspector of Immigration placed your petitioner under oath and took his testimony in relation to the matters referred to, wherefrom it appears, without contradiction, that your petitioner neither does nor at any time has believed in nor advocated the destruction of property, the commission of acts of violence, the overthrow of organized government in any form, or the commission of any criminal acts; that your petitioner has since 1916 been a member of an organization known as the Industrial Workers of the World, sometimes acting therefor in an official capacity; that at the time of his arrest he was and for a short time had been duly qualified and acting secretary of Lumber Workers Union No. 500, a branch or department of said Industrial Workers of the World; that he believed in the principles of said organization in so far as they were expressed in its preamble, namely: that the present industrial system, sometimes known as the wage system, was unsound economically and unjust to employees in industry; that the same resulted in unjust and unsocial inequalities of economic circumstance and the unjust exploitation of working

people and should be changed by an organization of the workers organized on industrial lines for the purpose of preventing such exploitation; that it further appeared from said testimony that your petitioner had as an officer of said Industrial Workers of the World been instrumental in distributing among its members large quantities of literature on economic questions published by said organization without editorial comment either of approval or disapproval; that he personally agreed with the views of some of the writers as expressed therein and disagreed with others, but that no evidence was produced to show what pamphlets your petitioner has been thus instrumental in distributing, or with what views he agreed or with what he disagreed, except that it [4] appeared therefrom that your petitioner did not believe in the destruction of property or the commission of acts of crime or violence, or the overthrow of organized government as a means of accomplishing such industrial reform, nor had he ever been instrumental in distributing any works on sabotage or that certain pamphlet known as "The I. W. W., Its History, Structure, and Methods," written by Vincent St. John, nor did said Industrial Workers of the World believe in or advocate any such practices, but, on the contrary, in April, 1918, the general executive board of said organization had duly and regularly adopted and distributed among the members of said organization as the first official declaration of its attitude on said matters, a resolution directly repudiating and disavowing and disapproving all of

such practices. That it further appeared at said hearing that in November, 1917, your petitioner was arrested in St. Maries, Benwah County, Idaho, on a charge of criminal syndicalism, wherein it was charged that he was a member of and associated with an organization, namely, the Industrial Workers of the World, which advocated the commission of crime and acts of violence, destruction of property and other acts of terrorism as a means of accomplishing industrial reforms, and on the trial of said charge before a jury duly impaneled in the District Court of said county, your petitioner was found not guilty thereof. That the only evidence introduced against your petitioner on said hearing was his own testimony under oath, which was thereafter reduced to writing in the form of sixteen typewritten pages and a copy of the Joe Hill Memorial Edition of [5] of an I. W. W. song book which was attached thereto as an exhibit. That no other evidence of any kind was ever offered or received against your petitioner. That all of said evidence in so far as it bore upon the charges hereinabove referred to was of the character hereinabove indicated and there was no evidence to sustain either the charge that your petitioner or the Industrial Workers of the World believed in or advocated or justified the destruction of property, the commission of crime, or acts of violence or the overthrow of any organized government.

3. That notwithstanding the utter absence of any evidence to sustain either of the charges which your petitioner was held to answer, and notwithstanding

that all the evidence in relation thereto negatived and disproved both charges, on or about the first of June, 1919, the Secretary of Labor of the United States arbitrarily and without any authority in law for so doing issued his warrant in writing, wherein he found that your petitioner had been found within the United States advocating the unlawful destruction of property, and wherein he ordered that your petitioner be deported from the United States of America to the Dominion of Canada, the country from which he came. That said warrant was made without due process of law and is wholly void, and your petitioner's restraint and detention thereunder are wholly void and a violation of his rights under the constitution and laws of the United States; but that the said R. P. Bonham, acting under the pretended authority thereof intends to and will, unless restrained therefrom by this Court, remove your petitioner from the United States of America, where he has a lawful right to remain, to the Dominion of Canada. [6]

4. That your petitioner is now and at all times hereinabove referred to has been unlawfully restrained and deprived of his liberty by said R. P. Bonham, United States Inspector of Immigration in charge of immigration for the District of Oregon, in the Multnomah county jail, county of Multnomah, State of Oregon, under and by color of authority of the warrants issued by the Department of Labor of the United States hereinabove referred to, and not otherwise; that your petitioner is not now nor has he at any of the times herein referred to held under any

order, process, decree or commitment of any court, nor under any process whatever, nor from any cause whatever other than as herein alleged.

5. That your petitioner has no plain, speedy or adequate remedy at law by which to procure relief from unlawful custody as herein alleged or by which to prevent his unlawful deportation and removal from the United States of America.

6. That on the 12th day of June, 1919, acting by George F. Vanderveer, his attorney, your petitioner demanded of said R. P. Bonham copies of the warrants of arrest and deportation, and a transcript of the testimony hereinabove referred to, in order that he might incorporate the same in this petition, and offered to pay therefor the usual fees for the preparation thereof, and said R. P. Bonham then and there permitted your petitioner's attorney to inspect all of said documents and offered to furnish your petitioner with copies thereof on payment of stenographic charges for preparing the same, but thereafter on the 13th day of June, 1919, acting upon the advice or instructions of A. P. Schell, an officer of the United States Department of Labor, attached to the New York office of said department, the said R. P. Bonham arbitrarily and with full knowledge [7] of the use which your petitioner intended to make thereof, refused either to furnish your petitioner with copies of said records and documents or to permit his said attorney to again inspect the same, and because thereof your petitioner is wholly unable to incorporate the same in this petition, or to make any

more definite statement regarding the contents thereof.

WHEREFORE, your petitioner prays an order that a writ of habeas corpus issue out of and under the seal of this Court directed to R. P. Bonham, United States Inspector in charge of Immigration for the District of Oregon, requiring said R. P. Bonham to have the body of your petitioner in court at such time as may be fixed therefor, then and there to show cause, if any he has, why your petitioner should be longer restrained of his liberty.

And your petitioner further prays that said R. P. Bonham be required to produce and attach to his return to said writ copies of the warrant of arrest, warrant of deportation and a transcript of the evidence introduced against your petitioner all hereinabove referred to, to the end that this court may review said proceedings and determine therefrom whether the processes duly and regularly established by law have been followed and complied with, and your petitioner will ever pray.

NEIL GUINEY,
Petitioner.

GEORGE F. VANDERVEER,
Attorney for Petitioner. [8]

State of Oregon,
County of Multnomah,—ss.

Neil Guiney, being first duly sworn, says that he is the petitioner named in the foregoing complaint; that he has read said complaint and knows the contents thereof, and that except as to the matters referred to therein relating to the acts of his attorney,

the same is true of his own knowledge, and as to said other matters he has been informed and verily believes that the same are true.

NEIL GUINEY.

Subscribed and sworn to before me this 13th day of June, ——.

[Seal] MARTIN T. PRATT,
Notary Public for Oregon.

My commission expires Jan. 24, 1921.

Filed Jun. 13, 1919. G. H. Marsh. **[9]**

AND AFTERWARDS, to wit, on Friday, the 13th day of June, 1919, the same being the 88th judicial day of the regular March term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding —the following proceedings were had in said cause, to wit: **[10]**

In the District Court of the United States for the District of Oregon.

8457.

In the Matter of the Application of NEIL GUINEY for a Writ of Habeas Corpus and Ancillary Writ of Certiorari.

Order for Issuance of Writ of Habeas Corpus.

Upon reading and filing the complaint of petitioner herein, and it appearing therefrom that said petitioner Neil Guiney is unlawfully restrained of his liberty in the Multnomah County Jail, in Multnomah

County, Oregon, by R. P. Bonham, United States Inspector in Charge of Immigration for the District of Oregon, under and by color of authority of certain warrants issued by the Secretary of Labor of the United States, and that it is necessary to review the proceedings on which said warrants are based, that the Court should examine said warrants and the testimony taken in support thereof;

NOW, THEREFORE, on motion of George F. Vanderveer, attorney for the petitioner, IT IS ORDERED that a writ of habeas corpus issue out of and under the seal of this court directed to R. P. Bonham, United States Commissioner in Charge of Immigration for the District of Oregon, commanding him to produce the body of the petitioner, Neil Guiney, in this court on the 23d day of June, 1919, at 10 o'clock in the forenoon thereof, then and there to receive what the Court shall consider in the premises, and that said R. P. Bonham make return to said writ showing by what authority he restrains the said petitioner of his liberty, and that he incorporate in said return a transcript of all the testimony taken in relation to such detention.

Done in open court this 13th day of June, 1919.

R. S. BEAN,
Judge.

Filed Jun. 13, 1919. G. H. Marsh. [11]

AND AFTERWARDS, to wit, on the 26th day of June, 1919, there was duly filed in said court the return of the United States marshal of service of writ, in words and figures as follows, to wit: **[12]**

Return on Service of Writ of Habeas Corpus.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein named R. P. Bonham by handing to and leaving a true and correct copy thereof with R. P. Bonham personally at Portland, in said District, on the 14th day of June, A. D. 1919.

GEO. F. ALEXANDER,
U. S. Marshal.
By R. E. Lawrence,
Deputy.

Filed June 26, 1919. G. H. Marsh, Clerk. **[13]**

AND AFTERWARDS, to wit, on the 30th day of June, 1919, there was duly filed in said court the answer and return of respondent, in words and figures as follows, to wit: **[14]**

In the District Court of the United States for the District of Oregon.

In the Matter of the Application of NEIL GUINEY for Writ of Habeas Corpus.

Answer and Return of R. P. Bonham to Order to Show Cause.

To the Honorable Judges of the District Court of the United States for the District of Oregon:

Comes now R. P. Bonham, respondent herein, appearing by Barnett H. Goldstein, Assistant United States Attorney for the District of Oregon, and for his return and answer to the order of this Honorable Court, heretofore on the 13th day of June, 1919, issued and directed to him to show by what authority the petitioner herein, Neil Guiney, is restrained of his liberty and to show cause why the said Neil Guiney should not be discharged from custody, respectfully shows unto the Court and alleges:

I.

That one W. F. Watkins is now and for more than six years past has been a duly appointed, qualified and acting inspector of the Bureau of Immigration of the Department of Labor of the United States, and during all the said times herein mentioned was designated and appointed such inspector to perform the duties of such official within the State and District of Oregon, and that among the duties of said Inspector are those of the enforcement of the Acts of Congress and the laws of the United States pertaining to and having to do with the immigration and deportation of aliens resident or found within the United States, and particularly within said District of Oregon, [14½] not legally entitled to be and remain in this country for reasons propounded by law.

II.

That on, to wit, the 18th day of February, 1919, the said W. F. Watkins, Inspector as aforesaid, received from the United States Secretary of Labor a telegraphic warrant of the said Secretary number 54616/70, for the arrest of the petitioner Neil Guiney, charging him with being an alien, who advocated or taught the unlawful destruction of property in violation of the Immigration Act of February 17th, and which said warrant directed him the said W. F. Watkins, to take said petitioner into custody and to grant him a hearing to show cause why he should not be deported in conformity with law. That a copy of said warrant is hereto attached and made a part hereof and marked Exhibit "A."

III.

That in obedience to said warrant the said W. F. Watkins thereupon caused the arrest of the said petitioner and on, to wit, the 20th day of February, 1919, at Portland, in the State and District of Oregon, granted a hearing to said petitioner, informing him that the purpose of said hearing was to afford him an opportunity to show cause why he should not be deported to the country whence he came, said warrant being read and each and every allegation therein contained carefully explained to him. The petitioner was thereupon given an opportunity to inspect the warrant of arrest and the evidence upon which it was issued, which privilege was accepted.

IV.

Thereupon and on the said 20th day of February, 1919, the hearing was conducted by W. F. Watkins

as examining inspector, [15] in the presence of the said Neil Guiney and Margaret A. Scott, a stenographer; that a subsequent hearing was had on March 4, 1919, at Portland, in the State and District of Oregon, at which were present the said W. F. Watkins, examining inspector, the petitioner herein and Margaret S. Scott, stenographer; that a further and final hearing was had on May 10, 1919, at Portland, in the State and District of Oregon, at which were present the said W. F. Watkins, the examining inspector, the petitioner herein and James Trail, a stenographer.

V.

That all of said hearings were had for the purpose of determining whether the said Neil Guiney was in the United States in violation of the Immigration Act of February 5, 1917, for advocating or teaching the unlawful destruction of property as charged in said warrant of arrest, and to enable the said petitioner to show cause why he should not be deported in conformity with law upon the grounds aforesaid and were so instituted and conducted in all respects in conformity with the Immigration rules of the United States Department of Labor; that the original record of said hearings and the exhibits therein received are hereby referred to and by such reference incorporated *w*herein and presented and filed in court in this cause.

VI.

That thereafter and on the 10th day of May, 1919, the complete record of said hearings granted the said petitioner was by the said W. F. Watkins, Immigra-

tion Inspector, transmitted to the Commissioner General of Immigration of the United States in conformity with the immigration laws as aforesaid, together with the recommendations of the said Immigration Inspector and then [16] and there in charge of the Immigration Office at Portland, Oregon, for the consideration and determination of the said Commissioner General of Immigration and the Secretary of Labor as to whether or not a warrant for the deportation of the said petitioner should issue.

VII.

That thereafter and on, to wit, the 27th day of May, 1919, and after a consideration of the record in said proceedings and hearing for the deportation of the said petitioner, transmitted to him as aforesaid, the Honorable Secretary of Labor found and decided that the petitioner Neil Guiney was an alien found in the United States in violation of the Immigration Act of February 5, 1917, in that he was found advocating or teaching the unlawful destruction of property, and thereupon issued warrant for the deportation of the petitioner to the country from whence he came, to wit, Canada, which said warrant was directed to John H. Clark, United States Commissioner of Immigration, Montreal, Canada, and thereafter forwarded for service upon petitioner, to R. P. Bonham, respondent herein; that copy of said warrant of deportation is hereto attached and made a part hereof marked Exhibit "B."

VIII.

That R. P. Bonham, respondent herein, is now and

during the three years last past has been, an immigration inspector in charge of the United States Immigration Service, Department of Labor, at Portland, in the State of Oregon, and by virtue of said office is authorized to serve warrants of deportation, such as aforesaid, upon and to arrest the persons therein named. [17]

IX.

That R. P. Bonham, the respondent herein, was on, to wit, the 27th day of May, 1919, directed by the Commissioner General of Immigration to retain said Neil Guiney in custody, and to convey him to such point in Canada as the said John H. Clark, United States Commissioner of Immigration, may designate, in pursuance to the warrant of deportation on said date issued by the Secretary of Labor, commanding the said John H. Clark to deport the said Neil Guiney, alien, for the reasons herein alleged.

X.

That R. P. Bonham, the respondent herein, in obedience to such directions and the warrant of deportation as hereinbefore alleged, has taken the said Neil Guiney into custody and detained him in the Multnomah County Jail at Portland, Oregon, pending deportation of the said petitioner to Canada; that petitioner still remains in the Multnomah County Jail during the presentation by petitioner in this court of his application for writ of habeas corpus and that the said times and dates are the times and dates of imprisonment and detention of him, the said petitioner, by the said R. P. Bonham; that said

warrant of deportation is the cause and authority of him, the said R. P. Bonham, for the said imprisonment and detention of him, the said petitioner, as aforesaid.

XI.

That the petitioner Neil Guiney is legally detained by reason of the proceedings aforesaid and should be deported [18] into Canada in accordance with the law and legal procedure respecting the case; that the said hearing was fair and impartial and properly and regularly conducted as disclosed by the exhibits hereto attached and made a part thereof and the testimony duly and regularly transmitted to satisfy and did satisfy the proper authorities as to the merits of the Government's claim that said petitioner should be deported in accordance with the law and the rules and regulations in furtherance thereof; that said petitioner was accorded every right under the law and many courtesies not required by law and all files, testimony and matters bearing upon the case and necessary for petitioner to know were shown petitioner and full information imparted and full disclosures made therein.

WHEREFORE, the said R. P. Bonham, having fully answered the said order to show cause why writ of habeas corpus for the said Neil Guiney should not be issued as prayed in the said petition of the said Neil Guiney, and why, upon the final hearing of the said cause, the said Neil Guiney should not be discharged from the custody of the said R. P. Bonham, prays that the order heretofore in the said 13th day of June, 1919, issued by this Honorable Court and

directed to him as aforesaid, may be discharged, and said petitioner, Neil Guiney, remanded to the custody of him, the said R. P. Bonham, for execution of the said warrant of deportation, with costs to the United States of America, and against petitioner.

R. P. BONHAM,
Immigration Inspector at Portland, Oregon.
BARNETT H. GOLDSTEIN,
Assistant United States Attorney for Oregon, and
Attorney for R. P. Bonham. [19]

State of Oregon,
County of Multnomah,—ss.

I, R. P. Bonham, being first duly sworn, do on oath depose and say:

That I am now and during the three years last past have been Immigration Inspector in charge of the United States Immigration Service for the State and District of Oregon and stationed at Portland, Oregon; that I have read the foregoing return and answer to the order of this Honorable Court heretofore on the 13th day of June, 1919, issued and directed to me to show cause why writ of habeas corpus should not issue and know the facts therein stated and contained, and that the same are true, as I verily believe.

R. P. BONHAM.

Subscribed and sworn to before me this 30th day of June, 1919.

[Seal] JOHN C. VEATCH,
Notary Public for Oregon.

My commission expires Oct. 30, 1920. [20]

Exhibit "A."

UNITED STATES OF AMERICA.
DEPARTMENT OF LABOR.
WASHINGTON.

No. 54616/70.

To R. P. BONHAM, Inspector in Charge, Portland, Oregon, or to Any Immigrant Inspector in the Service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien

NEAL GUINEY,

who landed at an unknown port on or about the 1st day of Jan., 1918, has been found in the United States in violation of the immigration act of February 5, 1917, for the following among other reasons:

That he has been found advocating or teaching the unlawful destruction of property.

I, JOHN W. ABERCROMBIE, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1919." Pending further proceedings the alien may be released from custody upon furnishing satisfactory bond in the sum of $2,000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 18th day of February, 1919.

(Exact Copy as signed by John W. Abercrombie, March 2, 1919. B.)

ACTING SECRETARY OF LABOR. [21]

Exhibit "B."

UNITED STATES OF AMERICA.
DEPARTMENT OF LABOR.
WASHINGTON.

No. 54616/70. Incl. No. 1822.

To John H. Clark, U. S. Commissioner of Immigration, Montreal, Canada.

WHEREAS, from proofs submitted to me, after due hearing before Immigration Inspector W. F. Watkins, held at Portland, Oregon, I have become satisfied that the alien

NEIL (OR NEAL) GUINEY,

who landed presumably at the port of Gateway, Montana, on or about the 1st day of March, 1913, has been found in the United States in violation of the immigration act of February 5, 1917, to wit:

That he has been found advocating or teaching the unlawful destruction of property, and may be deported in accordance therewith;

I, JOHN W. ABERCROMBIE, Acting Secretary of Labor, by virtue of the power and authority vested in my by the laws of the United States, do hereby command you to return the said alien to Canada the country whence he came at the expense

of the appropriation, "Expenses of Regulating Immigation, 1919."

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 27th day of May, 1919.

ACTING SECRETARY OF LABOR.

(Exact copy as signed by John W. Abercrombie mailed May 27, by B.)

Filed June 30, 1919. G. H. Marsh, Clerk. By K. F. Frazer, Deputy. [22]

AND AFTERWARDS, to wit, on the 30th day of June, 1919, there was duly filed in said court, transcript of proceedings before the Secretary of Labor, as an exhibit to the answer and return of respondent, in words and figures as follows, to wit: [23]

Transcript of Proceedings Before the Secretary of Labor as an Exhibit to Answer and Return of Respondent.

DEPARTMENT OF LABOR.

Gen. No. 16.
54616/70.
Inc. 6200.

Washington, D. C., June 17th, 1919.

I hereby certify that the annexed is a true copy of the original file constituting the record of the Bureau of Immigration, Washington, D. C., in the case of

the alien Neil (or Neal) Guiney.

A. CAMINETTI,
Commissioner-General of Immigration.

(Official Title.)

OFFICE OF THE SECRETARY.

I hereby certify that A. Caminetti, who signed the foregoing certificate, is now, and was at the time of signing, Commissioner-General of Immigration, and that full faith and credit should be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Labor to be affixed this 17th day of June, one thousand nine hundred and nineteen.

[Seal, Department of Labor.]

JOHN W. ABERCROMBIE,
Acting Secretary of Labor.

EFH. **[24]**

COPY OF TELEGRAM.

Seattle, Wash., June 14th, 1919.

Immigration Bureau,
Washington, D. C.

Acting upon suggestion of Governor Boyle, and other prominent citizens of Nevada, I interviewed at Los Angeles Attorney Clearly who represented Tonopah cases found him to be defient and abusive of Governemtn laws, and officials. He stated it was the intention of the organization to obstruct all deportation proceedings as they were illegel. Saw Attorney VanVer at Protland yesterday, he demanded of inspector Bonham copy of record in case Neil Guiney number five four one six line seventy

stated it was his purpose to secure writ to descredit department officials as warrant of deportation issued without the record being examined. His request was refused. If writ issues hearing will be postponed until I see you. Have received copy of Judge Hand in Seattle cases suggest same be annexed to synopsis of cases for guidance of officers leaving Teusday morning, arrive Chicage noon Friday twentieth.

SCHELL.

6/16

File

A. W. P.

For orig. see 235–85 LEMP. [25]

54616–70. May 27th, 1919.

OFFICIAL COPIES to the U. S. Commissioner of Immigration at Montreal, Canada, for his information. The alien will be conveyed to such point in Canada as you may designate by an officer detailed by the Inspector in Charge at Portland, Oregon, to whom advices should be furnished.

For the Commissioner-General.

(Stamp) Exact copy as signed by Alfred Hampton.

Mailed May 27, by ———.

ASSISTANT COMMISSIONER-GENERAL.

RWS.

EFH. [26]

UNITED STATES OF AMERICA.
DEPARTMENT OF LABOR.
WASHINGTON.

No. 54616/70. Incl. No. 1822.

To John H. Clark, U. S. Commissioner of Immigration, Montreal, Canada.

WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector W. F. Watkins, held at Portland, Oregon, I have become satisfied that the alien

NEIL (or NEAL) GUINEY,

who landed presumably at the port of Gateway, Montana, on or about the 1st day of March, 1913, has been found in the United States in violation of the immigration act of February 5, 1917, to wit; That he had been found advocating or teaching the unlawful destruction of property, and may be deported in accordance therewith:

I, JOHN W. ABERCROMBIE, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to Canada the country whence he came, at the expense of the appropriation, "Expenses of Regulating Immigration, 1919."

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 27th day of May, 1919.

(Stamp) Exact copy as signed by John W. Abercrombie.

Mailed May 27, by B.
ACTING SECRETARY OF LABOR.
WW.
EFH.
RWS. [27]

U. S. DEPARTMENT OF LABOR.
BUREAU OF IMMIGRATION.
WASHINGTON.

In answering refer to
No. 54616/70

May 27th, 1919.

Inspector in Charge,
Immigration Service,
Portland, Oregon.

Sir:

The Bureau acknowledges the receipt of your letter of May 10th, 1919, No. 5040/30, transmitting record of hearing accorded the alien NEIL (or NEAL) GUINEY, who entered presumably at the port of Gateway, Montana, on or about the 1st day of March, 1913.

After a careful examination of the evidence submitted in this case, the Department is of the opinion that the alien is in the United States in violation of law. You are therefore directed to cause him to be taken into custody and conveyed to such point in Canada as the U. S. Commissioner of Immigration at Montreal, Canada, may designate, the expenses incident to such conveyance, including the employment of an attendant to assist in delivery, if necessary, at a nominal compensation of $1.00 and expenses both

ways, being authorized, payable from the appropriation "Expenses of Regulating Immigration, 1919."

Respectfully,

For the Commissioner-General.

(Stamp) Exact copy as signed by Alfred Hampton. Mailed May 27, by ———.

Approved: Assistant Commissioner General.

(Stamp) Exact copy as signed by John W. Abercrombie. Mailed May 27, by ———.

Acting Secretary.

Inclose W. D. No. 1822.

RWS.

EFH. **[28]**

(On Slip:)

After an examination of the attached record I find the same to be correct as to form and procedure, and in accordance with Rule 22 of the Immigration Rules.

H. McCLELLAND,

Law Examiner.

Noted

May 23/19.

AWP.

54616–70.

May 21, 1919.

In re NEIL GUINEY; aged 29; native and citizen of Canada; entered presumably at Gateway, Montana, without inspection, on or about March 1st, 1913.

MEMORANDUM FOR THE ACTING SECRETARY.

The above-named alien was arrested at Portland, Oregon, on the ground that he has been found advo-

cating or teaching the unlawful destruction of property.

This man states that during his period of residence in this country he has for the most part been employed as a lumber jack in the forests of the northwest; that he became a member of the I. W. W. in October, 1916, and since the latter part of September, 1918, he has been secretary of the Lumber Workers branch of the I. W. W.; also that he has been at various times stationary delegate, branch secretary and traveling delegate. He is now in charge of the Union Headquarters of the Lumbermen's branch, Portland, which has a membership of about 35,000. He says that until arrested he received a weekly salary of $28.00, but is not being paid now because he is not functioning. A deposit of $1300.00 in his name in the Hibernia Savings Bank represents the account he is keeping for the organization. He says that his duties as secretary of the Lumbermen's branch of the I. W. W. are to look after the accounts of the organization, supervise the work, keep in touch with the members, answer correspondence, and superintend the distribution of I. W. W. literature. He says that while he does not agree in all things with some of the I. W. W. writers he is in thorough accord with the objects and aims of the organization as a whole. As to the question of sabotage he **[29]** attempts to say that the I. W. W. does not teach this doctrine. At the same time he admits that among other I. W. W. literature he has distributed the pamphlet entitled "I. W. W. Songs to Fan the Flames of Discontent," and "The Revo-

lutionary I. W. W." These pamphlets are made a part of the record and an examination of same will clearly show that the first mentioned one does teach the doctrine of sabotage or the unlawful destruction of property, and the second, Bolshevism, as will be noted by an excerpt taken from it as follows: "We are going to do away with Capitalism by taking possession of the land and the machinery of production. We don't intend to buy them, either." The alien is quite intelligent and during the hearing was evasive and argumentative. It was rather difficult to secure direct answers from him. Guiney admits that he was previously arrested and prosecuted in the State of Idaho on the charge of criminal syndicalism, but was finally acquitted after spending four months in jail awaiting trial. The Inspector in Charge at Portland is of the opinion that this man is a dangerous and active member of the I. W. W. and has done all he could to assist in spreading pernicious propaganda in that section of the country.

In view of his admitted activities in selling and distributing sabotage-teaching literature, the Bureau finds that he is guilty of the charge of teaching or advocating the unlawful destruction of property, and upon that ground recommends his deportation to Canada at Government expense.

A. CAMINETTI,
Commissioner-General.

HMc/SHN.
Approved.

JOHN W. ABERCROMBIE,
Acting Secretary. **[30]**

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

In Answering Refer to
No. 5040/30

Office of Inspector in Charge
Portland, Oreg.
May 10, 1919.

Hon. Commissioner-General of Immigration,
Washington, D. C.

Receipt is acknowledged of your letter of the 5th inst., file No. 54616/70, directing that the alien, Neil Guiney, be re-questioned as to kind of literature he has distributed while acting as secretary, organizer and delegate for the I. W. W. organization.

Enclosed please find transcript in duplicate of his statement secured this day. You will note therefrom that the alien has identified four I. W. W. pamphlets, samples of which are herewith transmitted, as part of the literature which he as I. W. W. secretary, organizer and delegate has distributed. Among publications so identified is the book entitled "I. W. W. Songs—To Fan the Flames of Discontent" as referred to in Bureau's letter. You will note that the alien circulated this pamphlet in his capacity as delegate for the Lumberworkers' Union of the I. W. W., the further circulation of the publication, after he became secretary of the union, being interrupted because of their supply having become exhausted. The alien mentions a later edition of the book which was thereafter printed and circulated by his union. It is hoped that the evidence herewith enclosed will supply the information which the Bureau desires and

enable it to reach a conclusion in this case.

Previous to the introduction in evidence of the [31] enclosed pamphlets, Guiney was again thoroughly questioned as to his alleged birth and residence in Canada. The record of this examination was not included with the transcript forwarded herewith as we did not desire to burden you with reading a mass of testimony having to do solely with that question. Information obtained on that point, however, will be forwarded to the Commissioner of Immigration, Montreal, in a further effort to secure the consent of the Dominion authorities to Guiney's return to Canada. Alien is a very clever fellow and is trying to withhold all information possible which might be used by us in establishing his Canadian citizenship. We hope to be able to secure satisfactory evidence of his nationality, however, and effect his return to Canada whenever the Department so orders.

We have heretofore sent you copies of a number of communications passing between this alien, who is confined in the County Jail here, and other "fellow workers" of the I. W. W. Copies of five such communications are forwarded herewith as being of possible interest to the Bureau.

W. F. WATKINS,
Acting Inspector in Charge.

WFW:JT. [32]

U. S. IMMIGRATION SERVICE,
Office of Inspector in Charge,
Portland, Oregon.

Report of statement taken by Immigration Inspector, W. F. Watkins, in the case of Neil Guiney,

at Portland office, May 10, 1919.

Present: W. F. WATKINS, Examining Inspector.
JAS. TRAIL, Stenographer.

Alien, being sworn, testified as follows:

Q. You are the same Neil Guiney, are you, who testified in this office on February 20th, 1919, during your hearing under Departmental Warrant of arrest dated February 18th, 1919? A. Yes.

* * * * * * * * *

Q. (Testimony referring to circulation of I. W. W. Literature by Neil Guiney.)

Q. Now, Mr. Guiney, what pamphlets and literature has the Lumber Workers' Industrial Union No. 500, of the I. W. W. organization, of which you have been secretary, been circulating?

A. Most of the pamphlets of the I. W. W. except those pertaining to other specific industries.

Q. I show you a sample of "The Revolutionary I. W. W.," by Grover H. Perry. Is that one of the pamphlets of your union, of which you are Secretary? A. Yes.

Q. I show you a pamphlet entitled "The I. W. W.—Its History, Structure and Methods," by Vincent St. John. Is that one of the publications circulated by your union?

A. It has been circulated by the Lumber Workers' Union, yes. I do not think it was while I was in office. To the best of my knowledge it was not handled while I was in office for the simple reason that it was out of publication and it is and old pamphlet and is not being used. [33]

Q. I show you a pamphlet entitled "I. W. W.

Songs—To Fan the Flames of Discontent—(Industrial Workers of the World—I. W. W. Universal Label) Joe Hill Memorial Edition." Is that one of the pamphlets circulated by your union?

A. The book was out of print when I became Headquarters Secretary for Union 500 of the I. W. W. I distributed that book prior to that time as Stationary Delegate of Lumber Workers' Union of the I. W. W. when I was at St. Marys, Idaho. This is an old edition. There is a later edition of the Song Book published by the General Office entitled "General Defense League."

Q. Does it contain the same songs as this pamphlet? A. Some of them.

Q. Did you formerly circulate this song book?

A. Yes, but not within the last year.

Q. It is not printed any more?

A. There is a later edition and we have been circulating the later edition.

Q. But during your official connection with the I. W. W. you have circulated this particular song book?

A. While I was a member of the organization, yes.

Q. And you yourself have circulated the book?

A. Yes.

Q. I show you a pamphlet entitled: "I. W. W. One Big Union Of All The Workers—The Greatest Thing on Earth." Is that one of the pamphlets circulated by you as an official of the I. W. W.?

A. Yes.

* * * * * * * * *

Certified true transcript.

JAMES TRAIL,
Stenographer. [34]

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Office of Inspector in Charge,
Portland, Oregon.

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A. Yes.

* * * * * * * * *

Certified true transcript.

JAMES TRAIL,
Stenographer. [36]

(Cover of Pamphlet:)

THE

REVOLUTIONARY

I. W. W.

By Grover H. Perry.

[Industrial Workers of The World I. W. W. Universal Label.]

I. W. W. Publishing Bureau,
112 Hamilton Ave., Cleveland, Ohio. [37]

(Title page:)

THE

REVOLUTIONARY

I. W. W.

By Grover H. Perry.

HOW SCABS ARE BRED

By the Same Author

CONSTRUCTIVE PROGRAM

OF THE I. W. W.

By B. H. Williams

Price Five Cents

Cleveland

I. W. W. Publishing Bureau

July 1916 [38]

THE REVOLUTIONARY I. W. W.

What kind of an organization is the Industrial Workers of the World? Why is it organized? Where is it organized? How is it organized?

These are questions that are being asked all over the country to-day by workers, students and men and women from all walks of life.

Thousands of columns of newspaper publicity has been given to the Industrial Workers of the World as a result of its activity. Countless magazine articles have been devoted to it and its alleged prin-

ciples. Still, the reading public has at best but a hazy conception of what the organization really is or what it stands for.

These questions the writer will try to deal with in his own way. First of all, however, it is necessary to show a few of the things "which we are not."

The I. W. W. is not a political organization in the sense that political organizations are to-day understood. It is not an anti-political sect. It is not a reform body. Its membership is not made up of anarchists, as some writers have stated. Its ranks are not exclusively composed of socialists, as others have asserted. True, some of its members may have accepted the anarchist philosophy. Others may have accepted the socialist faith. However, to the organization of the Industrial Workers of the World they are known only as workers, as members of the working class.

What "One Big Union" Means.

The Industrial Workers of the World is a labor union that aspires to be the future society. It is a labor organization that holds that craft, district, or other forms of division [39] are harmful to the workers. It teaches that an industrial system of organization must replace the antiquated forms.

Every man, woman or child who works in a given industry must be organized into the one big industrial union of his or her industry. The "ONE BIG UNION" slogan of the I. W. W. does not mean mass unionism. It does not mean that the railroad worker, the plumber, the teamster and the baker will be all in the same local union. That form of organ-

ization has been proven a failure. It has been shown to be unsound. Mass organization, irrespective of industrial needs, is too unwieldy to produce results.

The "one big union" slogan of the I. W. W. means CLASS organization according to industry. It has been proven practical by the capitalists themselves. All the great trusts and monopolies are organized according to industry. The steel trust, for example, not only owns the mills wherein steel rails and other products are made, but also the mines from which the iron ore is taken. It owns the railroads leading from the mines to the lakes. It owns the steamship lines that haul the ore. It owns the blast furnaces that smelt the ore. In short, the steel trust is an industrial organization, covering every branch of the industry. The I. W. W. proposes to follow the bosses' plan and scope of organization for the benefit of the worker.

THE RAILROAD INDUSTRY.

Let us show an example—the railroad industry. This will show the form of the organization of the I. W. W. It will also tend to show the futility of the craft form of organization.

Every worker on a railroad, whether he be a section [40] hand or a locomotive engineer, works for the same employer. All are necessary to the maintenance and operation of the railroad. If they were not they would not be employed. Railway corporations do not hire men from philanthropic motives; they hire men because they need them. All these workers are but units in the great railway

organization. All perform certain functions, without which the railroad could not be operated. The section hand must keep the track in repair, else the engineer cannot run his locomotive at the required speed.

All have the same interests in common—more wages, shorter hours, and better conditions. Logically all should be organized together. However, we find that the craft union organizes the engineer into an isolated union having its own international officers and its own agreement with the railway company. The brakeman is in another union, having another agreement or contract; the conductor in another, and so on all along the line. We find that there are seven different international craft unions in the railway industry, not to mention the shopmen. In the railroad shops and roundhouses there are at least ten other craft organizations. All these different organizations have separate contracts with the railroad company; all these contracts expire at different dates. The result is disastrous to the workers. When the fireman goes on strike, the engineer remains at work; his union contract must be lived up to; he is liable to a heavy fine if he violates it. The engineer stays on the job and teaches the scab fireman how to attend to the water gauge. He teaches him how to attend to the boiler. In short, he teaches the amateur scab how to become an efficient scab. When the switchman goes on strike, the brakeman remains at work, and vice versa. [41]

A few years ago, during the switchmen's strike on all railroads west of Chicago, union brakeman

switched the trains before starting on their runs. After doing switchmen's work while the latter were on strike, the brakemen then voted a strike assessment to help the switchmen. It was like cutting a man's head off and then offering him a piece of court-plaster to heal it with.

At the present writing (July, 1913), a strike is on on the Illinois Central railroad among the shopmen in the railroad shops and roundhouses. Union conductors, engineers and firemen are hauling scabs to and from their work. Union switchmen switch disabled engines into the roundhouse for the scabs to repair. All this time the shopmen are struggling for better conditions.

We of the Industrial Workers of the World hold that organization as outlined above is nothing more or less than organized scabbing. Whenever a group of workers remain at work while others in the same industry are striking for better conditions, they are helping to defeat those who are on strike. In so doing they are acting the part of scabs. The mere fact that they carry a craft union card in their pocket does not change the status of the case. If their union sanctions such action, then their union card is nothing more than a scabbing permit.

The I. W. W. claims that inasmuch as every worker on the railroad is necessary to the maintenance and operation of the railroad, therefore every worker should belong to the "one big union" of railroad workers. The section hand, the trackman, the engineer, the switchman, and others—all in their industrial union. Then when a strike is to be called,

call them all out, from the man who handles a shovel on the grade, to the man who handles the throttle of a locomotive; from the man [42] who pushes a truck in the freight house to the man who pushes a telegrapher's key in the dispatcher's office.

Then you have a real railroad strike. Not a train would move. The industry would be paralyzed. Think what power the workers would have. The railroad company would be forced to accede to the demands of the workers. That is the way the I. W. W. proposes to organize.

I. W. W. AIMS TO INCLUDE ALL WAGE WORKERS.

As we would organize the railroads, so we would organize all workers in all industries. Carpenters, plumbers, bricklayers, cement mixers, masons, laborers, and all building workers, into one industrial union of building workers. Weavers, spinners, doffers and loom-fixers, together with all other textile workers into one big industrial union of textile workers. Barbers, elevator boys, janitors, etc., into one union of public service workers.

All industrial unions of a kindred nature are to be combined into the industrial department to which they belong. For example, Marine Transport Workers' Industrial Union, Railway Transportation Workers' Union, Railway Construction Workers' Industrial Union, Street Car, Subway, Elevated R. R. Workers' Industrial Union, etc.—all organized in the Transportation Department of the Industrial Workers of the World.

All industrial unions, industrial departments and

local unions, to compose one great central organization—the Industrial Workers of the World. This organization will embrace all workers, in all industries, in all countries through the world.

We aim to have a union broad enough to take in every worker, and narrow enough to exclude all who are not workers. [43] We aim to build up a nation of workers that will have no boundary lines or limits except those of the world's industries themselves. We intend to wipe out class lines by doing away with classes. We propose to inaugurate a system of society where the workers will get the value of what they produce for themselves.

No Nationality or Color Lines.

This statement necessarily brings us to another phase of the I. W. W. movement, which will show that we are international in scope and recognize but one nation, the nation of those who work.

The Industrial Workers of the World is an INTERNATIONAL movement; not merely an American movement. We are "patriotic" for our class, the working class. We realize that as workers we have no country. The flags and symbols that once meant great things to us have been seized by our employers. Today they mean naught to us but oppression and tyranny. As long as we quarrel among ourselves over differences of nationality we weaken our cause, we defeat our own purpose. The practice of some craft unions is to bar men because of nationality or race. Not so with the I. W. W. Our union is open to all workers. Differences of color and language are not obstacles to us. In our organization,

the Caucasian, the Malay, the Mongolian, and the Negro, are all on the same footing. All are workers and as such their interests are the same. An injury to them is an injury to us.

An example of the way nationality bars are thrown down in the I. W. W. was shown in the great Lawrence strike. Here 27 different nationalities speaking over 47 different [44] tongues, brought up under different customs and conditions, united in one great cause. All differences were forgotten. They had one common enemy, the woolen trust. They centered all their forces on that enemy. Turks and Italians fought side by side against their common enemy, although their respective countries were at war at the time. For nine long weeks, in the dead of winter, the workers, under the banner of the I. W. W. showed what solidarity could accomplish. Fifteen million dollars a year was the increase in wages that the textile workers received as a result of their fight. More than that, however, was the knowledge they gained of their own power.

No longer will the slaves in Lawrence be docile as in the past. No longer will they submit to unspeakable brutalities such as were their portion before the strike. They have gained a knowledge of organization together with the cardinal principle of solidarity, that is priceless.

Such a strike as the Lawrence strike could only be made possible by long and continued agitation. Such agitation was carried on for years by the I. W. W. in Lawrence. Such agitation is being carried on by the

I. W. W. throughout the world. One day this agitation is going to bear fruit.

Low Fees and Dues—Universal Transfer.

Not only do we differ from the craft unions on the admission to membership of so-called aliens, but we also differ in the matter of initiation fees and dues. The tendency in the craft union is to keep all workers out of the organization after a certain stage is reached. Initiation fees as high as $300 are charged for admission to some craft unions; $75 and $50 initiation fees are common among craft unions in the building trades. High dues are also common. The I. W. W. low dues are always the rule, low initiation fees likewise. [45] We want an open union, and then we will have a closed shop. The initiation fee in the I. W. W. can never be over $5.00, and in most cases it is 50 cents to $1.00. Dues are almost uniformly 50 cents per month, and never can be over $1.00 per month. Every inducement to join that can be offered to the worker, is offered by the I. W. W.

Another feature of the I. W. W. is the universal transfer of cards. We recognize the card of any labor organization in the world in lieu of an initiation fee. A member of the Industrial Workers of the World can transfer from one industrial union to another of the same or of a different industry, without cost. One union, one card. Once a union man, always a union man.

POWER OF THE I. W. W.

Now, a few words as to where we are organized. A few years ago the I. W. W. was unknown. It consisted of a few small groups of propagandists who

were working day and night to spread the message of industrial unionism. Today our agitation is bearing fruit. Today we are not only a propaganda power, but we are the important factor in the labor movement in the United States.

Today a strike of 1,000 industrial unionists will attract more attention than a strike of 20,000 craft unionists. Why? Because the powers that be recognize in the I. W. W. a power that is one day going to overcome their power. Today the I. W. W. has almost complete sway over the textile industry. The lumber barons are also beginning to feel its power. On the high seas (and on the shores) we have organized the National Industrial Union of Marine Transportation Workers, with strong organizations on the Atlantic seaboard. In nearly every State we have locals that are recruiting more and wore workers to [46] our banner. We have had more successful strikes in the past year than the American Federation of Labor with its 27,000 different local unions.

In South Africa the great street-car strike at Johannesburg, two years ago, was conducted by the I. W. W. In New Zealand and Australia we have national administrations paying a nominal per capita into the General Organization. In Alaska and Hawaii local unions are springing up. In Europe the syndicalist movement looks to the I. W. W. for new tactics and methods of organization.

Organizing a New Social System.

The I. W. W. is fast approaching the stage where it can accomplish its mission. This mission is revolutionary in character.

The Preamble of the I. W. W. Constitution says in part: "By organizing industrially we are forming the structure of the new society within the shell of the old." That is the crux of the I. W. W. position. We are not satisfied with a fair day's wages for a fair day's work. Such a thing is impossible. Labor produces all wealth. Labor is therefore entitled to all wealth. We are going to do away with capitalism by taking possession of the land and the machinery of production. We don't intend to buy them, either. The capitalist class took them because it had the power to control the muscle and brain of the working class in industry. Organized, we, the working class, will have the power. With that power we will take back that which has been stolen from us. We will demand more and more wages from our employers. We will demand and enforce shorter and shorter hours. As we gain these demands we are diminishing the profits of the boss. We are taking away his power. We are gaining that power for ourselves. All the [47] time we become more disciplined. We become self-reliant. We realize that without our labor power no wealth can be produced. We fold our arms. The mills close. Industry is at a standstill. We then make our proposition to our former masters. It is this: We, the workers, have labored long enough to support idlers. From now on, he who does not toil, neither shall he eat. We tear down to build up.

In the place of the present system of society where crime, prostitution and poverty are rampant, a new society will arise. No more prostitutes. Girls will

no longer sell their bodies when they can get for themselves the full product of their labor. Crime will disappear as the incentive for it is taken away. Poverty cannot exist where all are workers and none are shirkers. Children instead of working in the mills will be in the schools. Mothers will no longer dread the ordeal of motherhood, from economic reasons. We will grow, physically, intellectually and morally. A new race will result, a race that will live for the joy of living, a race that will look with horror upon the pages of history that tell of our present day society.

The Industrial Workers of the World are laying the foundation of a new government. This government will have for its legislative halls the mills, the workshops and factories. Its legislators will be the men in the mills, shops and factories. Its legislative enactments will be those pertaining to the welfare of the workers.

These things are to be. No force can stop them. Armies will be of no avail. Capitalist governments may issue their mandates in vain. The power of the workers—industrially organized—is the only power on earth worth considering—once they realize that power. Classes will disappear, and in their [48] place will be only useful members of society—the workers.

THE CONSTRUCTIVE PROGRAM OF THE I. W. W.

By B. H. Williams.

Editorial in "Solidarity," June 7, 1913.

The charge is now being made and repeated constantly by the enemies of the Industrial Workers of the World, that our organization is committed "exclusively to a program of violent destruction"; that "the I. W. W. would destroy society and industry, leaving nothing but chaos in their place." With much eagerness and flourish a large part of the labor press is repeating this nonsense, until no doubt many sincere workers are misled by it, which is, of course, the intention of the enemy. In order to offset this, and supply our own active members with material with which to educate outside workers, "Solidarity" hopes from time to time, to deal in detail with the structural forms of the "One Big Union." Our readers should understand that it is not the alleged "Noisy talk" of the I. W. W. agitator that is so much feared by the capitalist master, as it is the attempt by the I. W. W. to BUILD CONCRETELY THE WONDERFUL STRUCTURE OF INDUSTRIAL SOLIDARITY, that shall replace the rule of the masters by the organized control of industry and society by the working class.

A brief outline of the structure of the I. W. W. is here given for the benefit of those who can be induced to enter more into detail with regard to their own particular industry and to apply that knowledge in their propaganda among their fellow workers: [49]

Local Industrial Union.

(1) The fundamental unit of I. W. W. organization, as provided for in our constitution, is the LOCAL INDUSTRIAL UNION, "branched according to the requirements of the particular industry." The I. W. W. takes account of the evolution of modern industry, from the era of small shops with distinct tools or implements of labor around which were grouped equally distinct craftsmen. For example, the word "blacksmith" or "weaver" at once suggests the mental picture of the man at the forge with hammer and anvil at hand; or the picture of the man or woman at the loom. The idea of the particular TOOL USED by the workers stands out in bold relief when the trade is thus named. The craft form of union followed logically from that method of production. But when we say "metal and machinery worker" or "textile worker" the concept is different, the tool is lost sight of, and in its place the PRODUCT comes to mind—a printing press; or cotton, woolen or silk cloth. There are many subdivisions or specialized groups of "Metal and machinery workers" as there are of "textile workers" co-operating together in turning out the given product. As a consequence, a metal and machinery shop, or a textile mill, can no longer be properly organized on a craft basis, according to the tools used by the workers.

Recognizing the fundamental changes due to industrial evolution, the I. W. W. provides for the organization of all workers in a given metal and machinery shop or a textile mill, into ONE SHOP

BRANCH—with regular branch officers, shop committees and general shop meetings or referendum, to deal with questions pertaining to their shop interests alone. In this way, we get directly at the boss or shop owner, at the closest [50] possible range.

But there may be many shops of the same kind in the same locality. Most matters do not concern a single shop only; for example, an eight-hour day, or an increase in wages is a matter that cannot well be settled by a single shop organization. Hence the shop branches must be grouped in such a way that all the workers in a given locality, or in all localities can act as a unit against their employers and for all the workers at once. So for the purpose of local unity of a given industry, all the shop branches are bound together in a LOCAL INDUSTRIAL UNION, for instance, of "metal and machinery workers" or of "textile workers." This local industrial union functions through a central committee or council composed of delegates from each of the shop branches, having all necessary officers to transact affairs of general concern, to maintain communication between the branches and larger subdivisions of the same industrial union, and so on. All detail work except important matters that require attention of the entire local membership, is attended to by the central committee or council. Such important matters are referred to a general meeting or a general referendum of the local membership. In this way, by the I. W. W. plan of organization, every possible detail is provided for.

Industrial District Council.

(2) Just as the local industrial union is the unit of I. W. W. organization, so GENERAL LOCAL UNITY is of prime importance in the development of the organization. Without strong, healthy and vitalized local organization, a general weakness is inevitable all along the line. The I. W. W. cannot properly function from the top down; it must function [51] FROM THE BOTTOM UP. Consequently, the I. W. W. provides for the very important formation known as the INDUSTRIAL DISTRICT COUNCIL, whose function it is to secure and maintain local unity and solidarity of all industrial groups. The district counsel is composed of representatives from each and all of the local industrial unions of a given locality. In case of a strike in a given industry, the council becomes a most effective instrument for calling into action all the workers of the locality to aid their struggling brothers. Raising funds, carrying out propaganda and organization, calling out workers in other industries, are some of the possible means by which the industrial district council may function as a quick and effective means of promoting local solidarity.

National Industrial Union.

(3) But local unity is not sufficient, the local industrial union and the district council are not complete in themselves. An eight hour day or demand for a general advance in wages may originate as a local movement, but in order to be successful against a MANUFACTURERS' ASSOCIATION or in face of the advantage that one competing capitalist

will naturally take of another such a movement must involve the entire industry. For instance, the Paterson textile workers (1913) demanded an eight-hour day and succeeded in completely tying up the silk shops of that city. Immediately the bosses shouted that they could not "compete with the mill owners of Pennsylvania, New York, and other sections of New Jersey." Thereupon the I. W. W. took them at their word, and proceeded to call out about 20,000 more strikers in the sections named, practically paralyzing the entire silk goods industry. The strikers of Hudson county, New Jersey, were offered their demands and requested to return [52] to work. They refused, "until such time as the Paterson strikers should be granted the eight-hour day and other concessions."

Thus the I. W. W. plan of organization has provided the NATIONAL INDUSTRIAL UNION for the purpose of bringing together all local industrial unions of a given industry into one national body. All the textile workers of the nation are to be united in one national industrial union. To transact its affairs, maintain unity of action and intercommunication between locals, etc., the national industrial union elects national officers and a national executive board, holds national conventions and deals with national matters through the referendum.

Through this form of organization, the textile workers, for example, will tend more and more to assume control of that industry, and to regard it as their particular RESPONSIBILITY in relation to the industrial society as a whole. Hence the basis

of that claim by capitalist writers (and given a foundation by the assertions of some "half-baked" "syndicalists") that the I. W. W. proposes to "have the miners own and control the mining industry; the textile workers own and control the textile industry," etc. This is not true, as will appear later. Suffice it to say here, that the national industrial union is provided for by the I. W. W. constitution to enable the workers in a given industry to maintain, in detail, the national unity and solidarity of that industry. This form of organization is seen to be essential both for purposes of defense and aggression against the capitalist enemy, and for shaping an essential part of the structure of the new society [53] which it is seeking to form within the shell of capitalism.

Department of Industries.

(4) Following the same "industrial lead" through the "vein" of modern capitalist industry, we find that a still larger grouping—of closly allied industries—is necessary. That is provided for under the name DEPARTMENT. In dealing with "departments" we cannot speak with the same assurance as with regard to the other subdivisions of the organization. Owing to the close inter-relation of "allied industries," the departmental lines are not clearly defined. Nevertheless, the I. W. W. constitution provides tentatively, for the following departmental structure:

1. The Department of Agriculture, Land, Fisheries and Water Products.
2. Department of Mining.

3. Department of Transportation and Communication.

4. Department of Manufacture and General Production.

5. Department of Construction.

6. Department of Public Service.

Each of these six departments will embrace all the national industrial unions of closely allied industries in the respective department to which they may properly belong. Under this classification, as at present conceived, the national industrial union of textile workers would be included in the Department of Manufacture and General production. A national industrial union of "Municipal Workers," having charge of the lighting, heating, paving, watering and otherwise administering cities, would belong to the Department of Public Service. But, as suggested above, the question of departmental grouping will have to be gone into more thoroughly, as the constructive [54] work of organization proceeds. The concept of "departments" only brings out more clearly the inter-relation of one industry to another, and provides for the closer unity of allied industries.

General Organization—Union of the Working Class.

(5) On this question of "closer unity" the I. W. W. constitution goes even farther. It proceeds on the understanding that wealth production is today a SOCIAL PROCESS, in which the entire working class co-operates to feed, clothe, shelter and provide the entire population of the world with the accessories of civilization. No single group of workers

stands alone; no single industry is sufficient to itself; no group of industries can operate independently of other groups. For instance, the textile workers would be unable to "clothe the nation" if other groups of workers did not supply them with food, build machinery for the mills, raise cotton, wool and flax as "raw material"; transport products to and from the textile factories, etc. At bottom, all the working class co-operates with or aids directly or indirectly any group of workers in performing its function.

Consequently, just as the local industrial union binds together the branches; the national industrial union the locals, and the departments the national industrial unions—so the departments, whether more or less than six in number when this form of grouping is worked out, will be brought together in ONE GENERAL UNION OF THE ENTIRE WORKING CLASS, whose functioning will bind together all workers of all industries into one co-operative commonwealth.

This form of organization precludes the idea of the workers in one industry "owning and operating that industry [55] for themselves." That proposal is found to be impossible of realization in view of the social character of production. The GENERAL ORGANIZATION of the I. W. W. is for the purpose of securing and maintaining the co-operation of all industrial groups for the work of social production for the use and benefit of all the people. The general organization has also another purpose at the present time—that of binding all the workers

of the organization together for common defense and aggression against the master class. Its present success along this line brings forth the cry that the "I. W. W. is trying to destroy society."

Through this form of organization thus briefly sketched, the I. W. W. is seen to have a constructive program, supplementing its destructive tactics against the capitalist enemy, that is invincible. And it is this CONSTRUCTIVE PROGRAM that alarms the masters and their retainers more than all the "loud talk" which they attribute to I. W. W. agitators. This program should be debated, studied and understood by all I. W. W. members first of all. Moreover it should form a part at least of every soap-boxer's speech. Without it, the "tactics" of the I. W. W. are of as little value as geometrical figures without material substances through which to express their meaning. Tactics are inseparable from organization. Therefore let us study and work to build the organization that, while striking capitalism its death blow, is at the same time preparing to put in the place of capitalism a new and better society. [56]

HOW SCABS ARE BRED.

By Grover H. Perry.

Craft unionism is the chief factor in creating scabs and the greatest stumbling block in the path of the laborer who wishes to improve his or her condition. The apprentice system is responsible for more strike breakers than any other known cause.

A man goes to work, we will say, in a shop where general building is carried on. He works in the

roofing and sheet metal department, which is thoroughly organized (?) in the A. S. M. W. I. A., which is the tinners and roofers craft union. It's perhaps the first time that he has ever had the opportunity to work in a union shop and he is enthused with the idea that at last *he* can become a union man, and, as such, be able not only to better his own conditions, but to help better the conditions of his fellow workers.

His first rebuff comes when he inquires of his fellow workers as to the steps necessary to become a member of the union. He is told that he is not wanted, and that before he can become a member he must have credentials showing that he has worked three years as an apprentice. Somewhat subdued, he inquires then as to how to become an apprentice. He is told that the number of apprentices is limited (one to every three journeymen), and that the shop has full quota of apprentices at the present time.

All this time the journeymen are working eight hours per day and receive $3.25 for that work, while he is working nine or ten hours a day and taking whatever the boss sees fit to hand him. He sees that the union does not concern itself as to whether he gets paid for overtime or not. He sees that [57] to all intents and purposes the union does not recognize his existence. All this time the idea is growing within him that the union is not organized for the benefit of the workers as a class, but for the benefit of those fortunate persons who are already members.

During the day's work he chances to pick up one

of the tools that the journeymen use while at work and is instantly commanded by a surly journeyman, who occupies the position of shop steward, to lay down that tool, and in the future to remember to obey the rules of the union (of which he is denied membership) in regard to laborers and helpers handling tools. These rules are printed on cards and hung in prominent places in the shop.

He is given to understand that he is a social inferior and that he should not expect the same privileges that journeymen enjoy. He must not touch the hammer (except on stated occasions, such as nailing drip), the snips or shears, soldering irons or any of the various tools that a man must become accustomed to before he can hope to acquire the faintest rudiments of the trade.

He is graciously permitted to carry slate, build scaffolds and paint tinwork and all other dirty work that may be required. He is supposed to be at the beck and call of the journeymen at all times and to be, in general, a good, faithful animal. If he dares to quastion the wisdom of the union in granting him these many benefits, the good union journeymen (who are afraid that he might learn to do the work that they are now doing) can and do make life miserable for him. He is told to hold a joint of pipe in place, so that the journeymen may fit it, and with his arms stretched at full length above [58] his head (which, by the way, is the most tiresome work in the world) he waits the journeyman's pleasure, while the journeyman talks over the latest prizefight news with one of his comrades.

The boss has had his eyes open all this time and if, in his judgment, the man will make a good workman he approaches him with a proposition to buy a share of stock in the company, which will give him the right to work at the work that the journeyman works at and to use the same tools, and thereby learn the trade.

For be it remembered that this same craft unionism which has so low an opinion of its helpers, and such utter disregard of their welfare, has at the same time such a high opinion of the boss and such deep concern for the interests of the stockholders that if anyone buys a share of stock in the concern that exploits them, he is permitted to work at anything all hours and for any wages. The man, by this time, thoroughly disgusted with the union, consents, and he begins to think that the employer has given him a squarer deal than the union. In a short period of time he begins to degenerate into one of those atavistic workingmen who think that their interest is wrapped up with that of their employer.

It may happen that the employer does not make this proposal and that the union, in the course of time, declares a strike. Then, and with some justice, the man reasons thus: "This union did not recognize me and did everything in its power to keep me from bettering my conditions. Now is my opportunity. I will take the place of one of these men and learn what I can of this trade and be in a better condition to wage the struggle of existence in the future." The reasoning lacks logic, but is perfectly natural under the circumstances. [59]

Thus scabs are bred.

These are the actual conditions that laborers work under.

Here are some of the rules of Local 266, A. S. M. W. I. A., New Castle, Pa.

Rule 7. Each shop shall be allowed one apprentice, but no two apprentices shall be allowed unless four or more journeymen are employed therein.

Rule 8. Apprentices going to work in a shop shall work two years for said boss, or cannot take another job until their two years are up.

Rule 10. Apprentices shall serve three years before they can become journeymen.

Rule 12. Helpers are allowed to paint, nail drip, put up circles and do other work not conflicting with the rules of this local.

These rules are typical, not only of this organization, but of all craft unions. Get wise and join a union that will protect every workingman whether he be a laborer or mechanic. In other words, join the I. W. W. [60]

(Cover of Pamphlet:)

THE I. W. W.

Its History, Structure and Methods.

By Vincent St. John.

Price 10 Cents.

I. W. W. Publishing Bureau.

1001 W. Madison St.

Chicago, Ill.

(Inside Cover:)

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THE I. W. W.

A Brief History.

In the fall of 1904 six active workers in the revolutionary labor movement held a conference. After exchanging views and discussing the conditions then confronting the workers of the United States, they decided to issue a call for a larger gathering.

These six workers were Isaac Cowen, American representative of the Amalgamated Society of Engineers of Great Britain, Clarence Smith, general secretary-treasurer of the **[61]** American Labor Union, Thomas J. Hagerty, editor of the "Voice of Labor," official organ of the A. L. U., George Estes, president of the United Brotherhood of Railway Employes, W. L. Hall, general secretary-treasurer U. B. R. E., and Wm. E. Trautmann, editor of the "Brauer Zeitung," the official organ of the United Brewery Workers of America.

Invitations were then sent out to thirty-six additional individuals who were active in radical labor organizations and the socialist political movement of the United States, inviting them to meet in secret conference in Chicago, Illinois, January 2, 1905.

Of the thirty-six who received invitations, but two

declined to attend the proposed conference—Max S. Hayes and Victor Berger—both of whom were in editorial charge of socialist political party and trade union organs.

The conference met at the appointed time with thirty present, and drew up the Industrial Union Manifesto calling for a convention to be held in Chicago, June 27, 1905, for the purpose of launching an organization in accord with the principles set forth in the Manifesto.

The work of circulating the Manifesto was handled by an executive committee of the conference, the American Labor Union and the Western Federation of Miners.

The Manifesto was widely circulated in several languages.

On the date set the convention assembled with 186 delegates present from 34 State, district, national and local organizations representing about 90,000 members.

All who were present as delegates were not there in good faith. Knowledge of this fact caused the signers of the **[62]** Manifesto to constitute themselves a temporary committee on credentials.

This temporary credentials committee ruled that representation for organizations would be based upon the number of members in their respective organizations only where such delegates were empowered by their organizations to install said organizations as integral parts of the Industrial Union when formed. Where not so empowered delegated would only be allowed one vote.

One of the delegations present was from the Illinois State District of the United Mine Workers of America. The membership of that district at that time was in the neighborhood of 50,000. Under the above rule these delegates were seated with one vote each. This brings the number of members represented down to 40,000.

Several other organizations that had delegates present existed mainly on paper; so it is safe to say that 40,000 is a good estimate of the number of workers represented in the first convention.

The foregoing figures will show that the precautions adopted by the signers of the Manifesto were all that prevented the opponents of the industrial union from capturing the convention and blocking any effort to start the organization. It is a fact that many of those who were present as delegates on the floor of the first convention and the organizations that they represented have bitterly fought the I. W. W. from the close of the first convention up to the present day.

The organizations that installed as a part of the new organization were: Western Federation of Miners, 27,000 **[63]** members; Socialist Trade and Labor Alliance,* 1,450 members; Punch Press Operators, 168 members; United Metal Workers,* 3,000 members; Longshoremen's Union, 400 members; the American Labor Union,* 16,500 members; United Brotherhood of Railway Employes, 2087 members.

The convention lasted twelve days; adopted a con-

*Existed almost wholly on paper.

stitution with the following preamble, and elected officers:

ORIGINAL I. W. W. PREAMBLE

"The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people and the few, who make up the employing class, have all the good things of life.

"Between these two classes a struggle must go on until all the toilers come together on the political, as well as on the industrial field, and take and hold that which they produce by their labor through an economic organization of the working class, without affiliation with any political party.

"The rapid gathering of wealth and the centering of the management of industries into fewer and fewer hands make the trade unions unable to cope with the ever-growing power of the employing class, because the trade unions foster a state of things which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. The trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

These sad conditions can be changed and the interests of the working class upheld only by an organization formed in **[64]** such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lockout is on in any department thereof, thus making an injury to one an injury to all."

All kinds and shades of theories and programs were represented among the delegates and individuals present at the first convention. The principal ones in evidence, however, were four: Parliamentary socialists—two types—impossibilist and opportunist, Marxian and reformist; anarchist; industrial unionist; and the labor union fak*ir*. The task of combining these conflicting elements was attempted by the convention. A knowledge of this task makes it easier to understand the seeming contradictions in the original Preamble.

The first year of the organization was one of internal struggle for control by these different elements. The two camps of socialist politicians looked upon the I. W. W. only as a battleground upon which to settle their respective merits and demerits. The labor fakers strove to fasten themselves upon the organization that they might continue to exist if the new union was a success. The anarchist element did not interfere to any great extent in the internal affairs. Only one instance is known to the writer; that of New York City where they were in alliance with one set of politicians, for the purpose of controlling the district council.

In spite of these and other obstacles the new organization made some progress; fought a few successful battles with the employing class, and started publishing a monthly organ, "The Industrial Worker." The I. W. W. also issued the first call for the defense of Moyer, Haywood and Pettibone under the title, "Shall Our Brothers Be Murdered?"; formed the defense [65] league; and it is due to the interest

awakened by the I. W. W. that other organizations were enlisted in the fight to save the lives of the officials of the W. F. M. which finally resulted in their liberation. Thus the efforts of the W. F. M. in starting the I. W. W. were repaid.*

SECOND CONVENTION.

The Second convention met in September, 1906, with 93 delegates representing about 60,000 members.

This convention demonstrated that the administration of the I. W. W. was in the hands of men who were not in accord with the revolutionary program of the organization. Of the general officers only two were sincere—the General Secretary, W. E. Trautmann, and one member of the Executive Board, John Riordan.

The struggle for control of the organization formed the Second convention into two camps. The majority vote of the convention was in the revolutionary camp. The reactionary camp having the chairman used obstructive tactics in their effort to gain control of the convention. They hoped thereby to delay the convention until enough delegates would be forced to return home and thus change the control of the convention. The revolutionists cut this knot by abolishing the office of President and electing a chairman from among the revolutionists.

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*Berger in the "Social Democratic Herald" of Milwaukee denied that the Moyer, Haywood and Pettibone case was a part of the class struggle. It was but a "border feud," said he. [66]

In this struggle the two contending sets of socialist politicians lined up in opposite camps.

The Second convention amended the Preamble by adding the following clause:

"Therefore without endorsing or describing the endorsement of any political party."

A new executive board was elected. On the adjournment*ment* of the convention the old officials seized the general headquarters, and with the aid of detectives and police held the same, compelling the revolutionists to open up new offices. This they were enabled to do in spite of the fact that they were without access to the funds of the organization, and had to depend on getting finances from the locals.

The W. F. M. officials supported the old officials of the I. W. W. for a time financially and with the influence of their official organ. The same is true of the Socialist Party, press and administration. The radical element in the W. F. M. were finally able to force the officials to withdraw that support. The old officials of the I. W. W. then gave up all pretence of having an organization.

The organization entered its second year facing a more severe struggle than in its first year. It succeeded, however, in establishing the general headquarters again, and in issuing a weekly publication in place of the monthly, seized by the old officials.

During the second year some hard struggles for better conditions were waged by the members.

The Third convention of the I. W. W. was uneventful. But it was at this convention that it became evident that the socialist politicians who had re-

mained with the organization were trying to bend the I. W. W. to their purpose; and a slight effort was made to relegate the politician to the rear.

The Fourth convention resulted in a rupture between the politicians and industrial unionists because the former [67] were not allowed to control the organization.

The Preamble was amended as follows:

I. W. W. PREAMBLE.

The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people and the few, who make up the employing class, have all the good things of life.

Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

We find that the centering of the management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever-growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping to defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into belief that the working class have interests in common with their employers.

These conditions can be changed and the interest of the working class upheld only by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work

whenever a strike or lockout is on in any department thereof, thus making an injury to one an injury to all.

Instead of the conservative motto, "A fair day's wages for a fair day's work, we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system."

It is the historic mission of the working class to [68] do away with capitalism. The army of production must be organized, not only for the every-day struggle with the capitalist, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old.

The politicians attempted to set up another organization, claiming to be the real industrial movement. It is nothing but a duplicate of their political party and never functions as a labor organization. It is committed to a program of the "civilized plane," i. e., parliamentarism. Its publications are the official organs of a political sect that never misses an opportunity to assail the revolutionary workers while they are engaged in combat with some division of the ruling class. Their favorite method is to charge the revolutionists with all the crimes that a cowardly imagination can conjure into being. "Dynamiters, assassins, thugs, murderers, thieves," etc., are stock phrases.

Following the victory of the Lawrence Textile workers the S. L. P. politicians renewed their efforts to pose as the I. W. W.

By representing that they were the I. W. W. and THE ONLY I. W. W. they were enabled to deceive several thousand textile workers in Patterson, Passaic, Hackensack, Stirling, Summit, Hoboken, Newark, New Jersey, and Astoria, Long Island, and collect from them initiation fees and dues.

In every instance these political fakers betrayed the workers into the hands of the mill owners, and the efforts of the workers to better their conditions resulted in defeat. At Paterson and Passaic the S. L. P. entered into an alliance [69] with the police to prevent the organizers of the I. W. W. from exposing them to the workers.

Their own actions, however, resulted in exposing them to the workers in their true colors and today they are thoroughly discredited with the workers throughout that district.

For a time the other wing of the political movement contented itself with spreading its venom in secret. Since the conclusion of the Lawrence strike the publications of the Socialist Party (with a very few exceptions), have never failed to use their columns to misrepresent and slander the organization and its active membership. Their attacks have extended to members of their own party who happened to be active members or supporters of the I. W. W.

STRUCTURE OF THE I. W. W.

Basing its conclusions upon the experience of the past the I. W. W. holds that it is essential to have the form and structure of the organization conform to the development of the machinery of production and the process of concentration going on in industry

in order to facilitate the growth of solidarity on class lines among the workers. Unless the structure of the organization keeps step with the development of industry it will be impossible to secure the solidarity so necessary to success in the struggles with the employing class.

Out of date forms of organization with their corresponding obsolete methods and rules will have to be broken down. To do this in time of a struggle means confusion and chaos that result in defeat.

The I. W. W. holds, that, regardless of the bravery and spirit the workers may show, if they are compelled to fight with old methods and an out of date form of organization against [70] the modern organization of the employing class, there can be but one outcome to any struggle waged under these conditions—defeat.

The I. W. W. recognizes the need of working class solidarity. To achieve this it proposes the recognition of the Class Struggle as the basic principle of the organization, and declares its purpose to be the fighting of that struggle until the working class is in control of the administration of industry.

In its basic principle the I. W. W. calls forth that spirit of revolt and resistance that is so necessary a part of the equipment of any organization of the workers in their struggle for economic independence. In a word, its basic principle makes the I. W. W. a fighting organization. It commits the union to an unceasing struggle against the private ownership and control of industry.

There is but one bargain that the I. W. W. will make with the employing class—COMPLETE SURRENDER OF ALL CONTROL OF INDUSTRY TO THE ORGANIZED WORKERS.

The experience of the past has proven the mass form of organization, such as that of the Knights of Labor, to be as powerless and unwieldy as a mob.

The craft form of union, with its principle of trade autonomy, and harmony of interest with the boss, has also been proven a failure. It has not furnished an effective weapon to the working class. True, it has been able to get for the skilled mechanics improved conditions; but due to the narrow structure of the craft organization, class interest has long since been lost sight of, and craft interest alone governs the actions of its membership. In the last analysis the craft union [71] has only been able to get advantages for its membership at the expense of the great mass of the working class, by entering into a contract with the employing class to stand aloof from the balance of the working class in its struggles. They have become allies of the employers to keep in subjection the vast majority of the workers. The I. W. W. denies that the craft union movement is a labor movement. We deny that it can or will become a labor movement.

To-day in the United States in all of the basic (large) industries, whenever any portion of the workers strive for better conditions, they enter into a conflict with the employing class as a whole. The expense of a strike is borne by the organized employers who have reached the point that, regardless

of what competition may still remain, they unite to keep the workers in subjection, because of the common interest all have in securing cheap labor power.

To meet this condition the Industrial Workers of the World proposes:

GENERAL OUTLINE.

1. The Unit of organization is the INDUSTRIAL UNION, "branched" according to the requirements of the particular industry. In some instances the Industrial Union may embrace all the workers of a given industry, while in other industries several Industrial Unions with distinct jurisdiction may be necessary to cover the situation; as, for instance, in the "Industry of Marin Transportation"—one union on the Great Lakes, one on the Atlantic and Gulf Seaboard, one on the Pacific Coast, one on the Mississippi River system—each being branched to meet the special requirements of the particular situation. [72]

2. Industrial Unions of closely allied industries are combined into departmental organizations. For example, the Marine Transport Workers' Industrial Unions referred to above would be united with Railway or Steam Transportation Industrial Unions, Municipal Transportation Industrial Unions, Motor Truck Transporters, and Aviators' Unions, into the "Department of Transportation and Communication."

3. The Industrial Departments are combined into the General Organization, which in turn is to be an integral part of a like Internationl Organization; and through the international organization estab-

lish solidarity and co-operation between the workers of all countries.

COMPONENT PARTS OF THE ORGANIZATION.

Taking into consideration the technical differences that exist within the different departments of the industries and conditions existing where large numbers of workers are employed, the Industrial Union is "branched" wherever necessary. If the union includes ALL the workers in a given industry or a distinct jurisdiction within an industry. "Industrial Branches" of the Union are established in the centers most convenient for the workers.

These Industrial Branches are further subdivided into—

1. Shop sections, so that the workers of each shop control the conditions that directly affect them.
2. Language sections, so that the workers can conduct the affairs of the organization in the language with which they are most familiar.
3. In those large industries which are operated by departments, DEPARTMENT subdivisions are formed to systematize and simplify the business of the organization. [73]
4. When an industry covers a large local area, or is the principal industry of a city, DISTRICT subdivisions are formed, to enable the workers to attend union meetings without traveling too great a distance.
5. In order that every given industrial district shall have complete industrial solidarity among the workers in all industries as well as among the work-

ers of each industry, an INDUSTRIAL DISTRICT COUNCIL is formed by delegates elected from all the Industrial Unions and Industrial Branches operating in that district and through this Council concerted action is maintained throughout the district.

FUNCTIONS OF THE LOCAL SECTIONS AND SUBDIVISIONS.

Shop and language sections, and department and district subdivisions deal with the employer ONLY through the Industrial Branch or the Industrial Union. Thus, while the workers in each section determine the conditions that directly affect them, they act in concert with all the workers of the industry through the Industrial Branch and the Union.

As the knowledge of the English language becomes more general, the language branches will disappear.

The development of machine production will also gradually eliminate the branches based on technical knowledge, or skill.

The constant development and concentration of the ownership and control of industry will be met by a like concentration of the number of Industrial Unions and Industrial Departments. It is meant that the organization at all times shall conform to the needs of the hour and eventually furnish the medium through which and by which the organized workers will be able to determine the amount of food, clothing, shelter, [74] education and amusement necessary to satisfy the wants of the workers.

ADMINISTRATION OF THE ORGANIZATIONS.

Industrial Unions have full charge of all their own affairs; elect their own officers; determine their pay; and also the amount of dues collected by the union from the membership. The general organization, however, does not allow any union to charge over $1.00 per month dues or $5.00 initiation fee.

Each Industrial Branch of an Industrial Union elects a delegate or delegates to the Executive Committee of the Industrial Union. This Executive Committee is the administrative body of the Industrial Union. Officers of the Industrial Branches consist of secretary, treasurer, chairman and trustees.

Officers of the Industrial Union consist of secretary and treasurer, chairman, and executive committee.

Each Industrial Union and Industrial Branch within a given district elects a delegate or delegates to the District Council. The District Council has as officers a secretary-treasurer and trustees. The officers of the district council are elected by the delegates thereof.

All officers in local bodies except those of district council are elected by ballot of all the membership involved.

Proportional representation does not prevail in the delegations of the branches and to district councils. Each branch and local has the same number of delegates. Each delegate casts one vote.

Industrial Unions hold annual conventions. Dele-

gates from each branch of the Union cast a vote based upon the membership of the Industrial Branch that they represent. [75]

The Industrial Union nominates the candidates for officers at the convention, and the three nominees receiving the highest votes at the convention are sent to all the membership to be voted upon in selecting the officers.

The officers of the Industrial Unions consist of secretary and treasurer, and executive committee. Each Industrial Union elects delegates to the Department to which it belongs. The same procedure is followed in electing delegates as in electing officers.

Industrial Departments hold conventions and nominate the delegates that are elected to the general convention. Delegates to the general convention nominate candidates for the officers of the general organization. These general officers are elected by the vote of the entire organization.

The General Executive Board is composed of one member from each Industrial Department and is selected by the membership of that department.

General conventions are held annually at present.

The rule in determining the wages of the officers of all parts of the organization is, to pay the officers who are needed approximately the same wages they would receive when employed in the industry in which they work.

I. W. W. TACTICS OR METHODS.

As a revolutionary organization the Industrial Workers of the World aims to use any and all tactics that would get the results sought with the least ex-

penditure of time and energy. The tactics used are determined solely by the power of the organization to make good in their use. The question of "right" and "wrong" does not concern us.

No terms made with an employer are final. All peace [76] so long as the wage system lasts, is but an armed truce. At any favorable opportunity the struggle for more control of industry is renewed.

As the organization gains control in the industries, and the knowledge among the workers of their power, when properly applied within the industries, becomes more general, the long drawn out strike will become a relic of the past. A long drawn out strike implies insufficient organization or that the strike has occurred at a time when the employer can best afford a shut down—or both. Under all ordinary circumstances a strike that is not won in four to six weeks cannot be won by remaining out longer. In trustified industry the employer can better afford to fight one strike that lasts six months than he can six strikes that take place in that period.

No part of the organization is allowed to enter into time contracts with the employers. Where strikes are used, it aims to paralyze all branches of the industry involved, when the employers can least afford a cessation of work—during the busy season and when there are rush orders to be filled.

The Industrial Workers of the World maintains that nothing will be conceded by the employers except that which we have the power to take and hold by the strength of our organization. Therefore we seek no agreements with the employers.

Failing to force concessions from the employers by the strike, work is resumed and "sabotage" is used to force the employers to concede the demands of the workers.

The great progress made in machine production results in an ever increasing army of unemployed. To counteract this the Industrial Workers of the World aims to establish the shorter work day, and to slow up the working pace, thus compelling the employment of more and more workers. [77]

To facilitate the work of organization, large initiation fees and dues are prohibited by the I. W. W.*

During strikes the works are closely picketed and every effort made to keep the employers from getting workers into the shops. All supplies are cut off from strike-bound shops. All shipments are refused or missent, delayed and lost if possible. Strike breakers are also isolated to the full extent of the power of the organization. Interference by the government is resented by open violation of the government's orders, going to jail *en masse,* causing expense to the taxpayers—which is but another name for the employing class.

In short, the I. W. W. advocates the use of militant "direct action" tactics to the full extent of our power to make good.

EDUCATION.

At the present time the organization has fourteen

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* Some of the craft unions charge from $25.00 to $250.00. One, the Green Bottle Blowers' Union, charges $1,000. [78]

publications of its own, twelve weekly, and two bi-weekly, in the following languages: English, 3, and one each in French, Italian, Spanish, Portuguese, Russian, Polish, Slavish, Lithuanian, Hungarian, Swedish and Jewish. A Spanish weekly and an Italian weekly are affiliated with the organization. One Russian weekly and an English monthly review are sympathetic, and a Finnish daily paper is consistently advocating the principles set forth in the preamble.

The general organization issues leaflets and pamphlets from time to time and aims to build up and extend educational literature in all languages as fast as the resources of the organization permit.

The Unions and their Industrial Branches hold educational meetings in halls and on the streets of the industrial centers. Reading rooms and halls are maintained by all the larger Branches. Revolutionary literature is kept on file.

Special shop meetings are held in efforts to organize certain industries.

STRUGGLES OF THE I. W. W.

In 1906 the eight-hour day was established for hotel and restaurant workers in Goldfield, Nevada.

In the same year sheet metal workers lost a strike at Youngstown, Ohio, due to the American Federation of Labor's filling the places of the strikers.

In 1907 textile workers of Skowhegan, Maine, 3,000 strong, struck over the discharge of active workers in the organization. The strike lasted four weeks and resulted in a complete victory for the strikers with improved conditions. John Golden,

president of the United Textile Workers, A. F. of L., attempted to break this strike by furnishing strike breakers.

In Portland, Oregon, 3,000 saw mill workers were involved in a strike for a nine-hour day and increase of wages from $1.75 to $2.50 per day. On account of the exceptional demand for labor of all kinds in that section at that time, most of the strikers secured employment elsewhere, and the strike played out at the end of about six weeks. The saw mill companies were seriously crippled for months, and were forced indirectly to raise wages and improve conditions of the employes. This strike gave much impetus to I. W. W. agitation in the western part of the United States.

In Bridgeport, Connecticut, 1,200 tube mill workers [79] were involved. This strike was lost through the scabbing tactics of the A. F. of L.

In the same year 800 silk mill workers engaged in a strike at Lancester, Pennsylvania. This strike was lost on account of a shutdown due to the panic of 1907 that occurred shortly after the strike started.

From March 10, 1907, until April 22, the W. F. M. and the I. W. W. at Goldfield, Nevada, fought for their existence (and the conditions that they had established at that place) against the combined forces of the mine owners, business men and A. F. of L. This open fight was compromised as a result of the treachery of the W. F. M. general officers. The fight was waged intermittently from April 22 till September, 1907, and resulted in regaining all ground lost through the compromise, and in destroy-

ing the scab charter issued by the A. F. of L. during the fight. This fight cost the employers over $100,000. The strike of the W. F. M. in October, 1907, took place during a panic and destroyed the organization's control in that district.

Under the I. W. W. sway in Goldfield, the minimum wage for all kinds of labor was $4.50 per day and the eight-hour day was universal. The highest point of efficiency for any labor organization was reached by the I. W. W. and W. F. M. in Goldfield, Nevada. No committees were ever sent to any employers. The unions adopted wage scales and regulated hours. The secretary posted the same on a bulletin board outside of the union hall, and it was the LAW. The employers were forced to come and see the union's committees.

Beginning in July, 1909, at McKees Rocks, Pennsylvania, 8,000 workers of the Pressed Steel Car Company, embracing sixteen [80] different nationalities, waged the most important struggle that the I. W. W. took part in to that date. The strike lasted eleven weeks. As usual, the employers resorted to the use of the Pennsylvania State Constabulary, known as the American Cossacks, to intimidate the strikers and browbeat them back to work. This constabulary is a picked body of armed thugs recruited for their ability to handle firearms. Every strike in Pennsylvania since the institution of the constabulary has been broken or crippled by them. Men, women and children have been killed and brutally maimed by them with impunity. Their advent upon the scene in McKees Rocks was marked

by the usual compaign of brutality. Finally one of the cossacks killed a striker. The strike committee then served notice upon the commander of the cossacks that for every striker killed or injured by the cossacks the life of a cossack would be exacted in return. And that they were not at all concerned as to which cossack paid the penalty, but that a life for a life would be exacted. The strikers kept their word. On the next assault by the cossacks, several of the constabulary were killed and a number wounded. The cossacks were driven from the streets and into the plants of the company. An equal number of strikers were killed and about fifty wounded in the battle. This ended the killing on both sides during the remainder of the strike. For the first time in their existence the cossacks were "tamed." The McKees Rocks strike resulted in a complete victory for the strikers.

On November 2, 1909, the city government at Spokane, Washington, started to arrest the speakers of the I. W. W. for holding street meetings. The locals at that point decided to fight the city and force it to allow the organization to hold [81] street meetings. The fight lasted up to the first of March following, and resulted in compelling the city to pass a law allowing street speaking. Over 500 men and women went to jail during the free speech fight. Two hundred went on a hunger strike that lasted from 11 to 13 days, and then went from 30 to 45 days on bread and water; two ounces of bread per day. Four members lost their lives as a result of the treatment accorded them in this fight.

Many more free speech fights have occurred since the one in Spokane, the most notable being at Fresno, California. Here the authorities in cahoots with employers attempted to stop I. W. W. agitation, which was directed toward the organization of the thousands of unskilled workers in the San Joaquin Valley, the fruit belt of California. Street meetings were forbidden in Fresno. The I. W. W. again made use of "direct action" methods, and filled the jails of that city with arrested street speakers. The fight lasted four months, and over 100 members were in jail for from two to three months. Arrested members refused to hire lawyers, and plead their own cases in court, or used some member of the organization as their "attorney." Finally, the organization outside of Fresno took an energetic hold of the fight, and organized a movement to "invade California." In accordance with this plan, detachments of free speech fighters started to "march on Fresno" from Spokane, Portland, Denver, St. Louis and other sections. Whereupon the Fresno authorities decided that they had enough, and surrendered. Freedom of speech was completely re-established in Fresno, and the I. W. W. has never since been interfered with.

A four months' strike of shoe workers occurred in Brooklyn, New York, in the winter of 1911. This strike was [82] most stubbornly contested on both sides, and resulted in improved conditions for the workers in some of the shops.

SOME OF THE STRIKES OF 1912.*

Local Union No. 10, Electrical Supply Workers, Fremont, Ohio. One strike; 30 men involved. Lost; because of inability to extend the same they shut down the plant.

Local Unions 161 and 169, Textile and Shoe Workers, Haverhill, Mass. Two strikes involving 572 members. Lasted seven weeks altogether. Both strikes successful. Sixty members arrested and 15 of them convicted and sentenced to jail for one to four months.

Local Union 194, Clothing Workers, Seattle, Washington. Ten small strikes lasting from a few hours up to two months. All of the strikes successful except one. Fifteen arrested, one conviction, two members held in jail nine weeks for deportation finally released. Number of workers involved not specified.

Local Union 326, Railroad Construction Workers, Prince Rupert, B. C. Two strikes, both of which were successful; 2,350 workers involved; 12 members arrested, all of whom were convicted and sentenced from six months to three years. This local also as-

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*Under this heading all the references to Local Unions and National Industrial Unions are based upon the terms used and the structure provided by the constitution prior to the 10th convention in 1916. The Industrial Workers of the World being as broad as industry and dealing with the workers in the industries rather than along mere local lines, the inconsistency of the words Local and National was cured by striking them out and thus removing any restrictions that may have been imposed upon our ideals by the use of such terms.—W. D. H. [83]

sisted in winning a strike for unorganized workers at the Shenna Crossing.

Local Union 327, Railroad Construction Workers, Lytton, B. C. One strike lasting seven months; 5,000 involved. 300 members arrested; 200 convicted and sentenced to from one to six months. This strike was called off by the local union owing to the failure to keep the line tied up. The contractors were forced, however, to improve wages and conditions.

National Industrial Union of Forest and Lumber Workers. Two strikes, involving seven local unions and 7,000 workers. One strike lasted two months and the other three weeks. No record of the number of members arrested, but there were several hundred. Three members were convicted and sentenced to from one to three months in jail. The strikes were partially successful in raising wages in the industry.

Extending the organization of the lumber workers in the southern lumber districts involves a contest with the employing class in a section of the country where the employers have held undisputed sway since the American continent was first settled.

Organizers are assaulted and killed by the armed thugs of the industrial lords. The will of the employing class is the law of the land.

July 7, 1912, a meeting held upon the public road at Grabow, Louisiana, was ambushed by the guards of the Galloway Lumber Company. Three men were killed and forty wounded. Following this attack, A. L. Emerson, the president of the southern district

organization, and sixty-four members were arrested and held for trial upon charges of conspiracy to commit murder. Emerson and nine of the members were tried and acquitted in spite of the efforts of the mill owners and lumber companies to railroad them to the penitentiary or gallows. All others were discharged from custody without trial.

Local Union 436, Lowell, Massachusetts, Textile Workers. **[84]** Two strikes, one of which resulted in victory and the other was lost; 18,000 involved. Number arrested in strikes 26, all of whom were convicted and sentenced to from one to six weeks in jail.

Local Union 557, Piano Workers, Boston, Massachusetts. One strike; 200 members involved. Strike lasted five weeks and was lost.

Local Union 20, Textile Workers, Lawrence, Massachusetts. Five strikes involving 29,000 workers; 333 arrested, 320 of whom were convicted and fined from $100 down, and to one year in jail. Most of these cases, however, were settled for a nominal fine on appeal to the higher court. (For an account of the great Lawrence strike and of the Ettor-Giovannitti trial growing out of it, see "Trial of a New Society," by Justus Ebert).

Local Union 157, Textile Workers, New Bedford, Massachusetts. Lockout, 13,000 workers involved. Number of arrests not known.

In addition to the above there were other strikes of smaller size, but the locals and members involved in the same have not furnished the General Office

with any information, so we cannot include data concerning them.

An estimate of the amount of money expended for relief and other expenses incidental to handling strikes in the year (1912) shows that $101,504.05 were expended in handling strikes involving a total of 75,152 strikers and their families, lasting over a period of 74 weeks in the aggregate. The number arrested during that period totaled 1,446; and there were 577 convictions. [85]

THE I. W. W. AT PRESENT.

The organization to date (Jan., 1917), consists of six Industrial Unions; Marine Transport Workers, Metal and Machinery Workers, Agricultural Workers, Iron Miners, Lumber Workers, and Railway Workers, having fifty branches and 200 unions in other industries, together with 100 recruiting unions directly united with the general organization.

The membership today consists very largely of unskilled workers. The bulk of the present membership is in the following industries: Textile, steel, lumber, mining, farming, railroad construction and marine transportation. The majority of the workers in these industries—except the textile—travel from place to place following the different seasons of work. They are therefore out of touch with the organization for months at a period. The paid-up membership of the organization at this time is 60,000. Due to the causes referred to above, this is all of the membership that keeps paid up on the books at all times. The general office, however, has

issued 300,000 cards, which is about the number of workers that are in the organization in good and bad tanding.

The general practice of exaggerating the membership of the organization is looked upon with disfavor in the I. W. W., as the organization aims to have the membership at all times look at all questions that affect their interests in their actual state. It is absolutely necessary that they do so if they are to be able to judge their strength and their ability to accomplish any proposed undertaking.

As will be seen, the organization in the past has had a continual struggle, not the least of which has been the internal strife engendered by conflicting elements whose activity **[86]** sprang from many different motives.

The future of the organization will be one of greater struggles. We would not have it otherwise. The internal strife will, no doubt, be present in the future as in the past. The employing class are fully aware that the most effective way of lessening the power of the revolutionary labor organization is to keep it busy with internal wrangles.

As the membership gain experience from actual contact with the problems of their class they will learn to know each other and the internal wrangles will disappear. Then this weapon in the hands of the employers will become useless, because the membership will refuse to be divided where their class interests are involved.

The future belongs to the I. W. W. The day of the skilled worker is passed. Machine production

has made the unskilled worker the main factor in industry. Under modern industrial conditions the workers can no longer act in small groups with any chance of success. They must organize and act as a class.

We are looking forward to the time when the organized proletariat will meet in their union the world over "and decide how long they will work, and how much of the wealth they produce they will give to the boss."

INDUSTRIAL UNION MANIFESTO.

Issued by Conference of Industrial Unionists at Chicago, January 2, 3 and 4, 1905.

Social relations and groupings only reflect mechanical and industrial conditions. The great facts of present industry are the displacement of human skill by machines and the increase [87] of capitalist power through concentration in the possession of the tools with which wealth is produced and distributed.

Because of these facts trade divisions among laborers and competition among capitalists are alike disappearing. Class divisions grow ever more fixed and class antagonisms more sharp. Trade lines have been swallowed up in a common servitude of all workers to the machines which they tend. New machines, ever replacing less productive ones, wipe out whole trades, and plunge new bodies of workers into the ever-growing army of tradeless, hopeless unemployed. As human beings and human skill are displaced by mechanical progress, the capitalists need use the workers only during that brief period when muscles and nerve respond most intensely. The

moment the laborer no longer yields the maximum of profits he is thrown upon the scrap pile, to starve alongside the discarded machine. A dead line has been drawn, and an age limit established, to cross which, in this world of monopolized opportunities, means condemnation to industrial death.

The worker, wholly separated from the land and the tools, with his skill of craftsmanship rendered useless, is sunk in the uniform mass of wage slaves. He sees his power of resistance broken by class divisions, perpetuated from outgrown industrial stages. His wages constantly grow less as his hours grow longer and monopolized prices grow higher. Shifted hither and thither by the demands of profit-takers, the laborer's home no longer exists. In this helpless condition, he is forced to accept whatever humiliating conditions his master may impose. He is submitted to a physical and intellectual examination more searching than was the chattle slave when sold from the auction block. Laborers are no longer classified [88] by difference in trade skill, but the employer assigns them according to the machines to which they are attached. These divisions, far from representing differences in skill or interests among the laborers, are imposed by the employer that workers may be pitted against one another and spurred to greater exertion in the shop, and that all resistance to capitalist tyranny may be weakened by artificial distinctions.

While encouraging these outgrown divisions among the workers the capitalists carefully adjust themselves to the new conditions. They wipe out all

differences among themselves, and present a united front in their war upon labor. Through employers' associations, they seek to crush, with brutal force, by the injunctions of the judiciary, and the use of military power, all efforts at resistance. Or when the other policy seems more profitable, they conceal their daggers beneath the Civic Federation and hoodwink and betray those whom they would rule and exploit. Both methods depend for success upon the blindness and internal dissensions of the working class. The employers' line of battle and methods of warfare correspond to the solidarity of the mechanical and industrial concentration while laborers still form their fighting organizations on lines of long-gone trade divisions. The battles of the past emphasize this lesson. The textile workers of Lowell, Philadelphia and Fall River; the butchers of Chicago, weakened by the disintegrating effects of trade divisions; the machinists on the Santa Fe, unsupported by their fellow-workers subject to the same masters; the long-struggling miners of Colorado, hampered by lack of unity and solidarity upon the industrial battlefield, all bear witness to the helplessness and impotency of labor as at present organized. [89]

This worn-out and corrupt system offers no promise of improvement and adaptation. There is no silver lining to the clouds of darkness and despair settling down upon the world of labor.

This system offers only a perpetual struggle for slight relief from wage slavery. It is blind to the possibility of establishing an industrial democracy, wherein there shall be no wage slavery, but where

the workers will own the tools which they operate, and the product of which they alone should enjoy.

It shatters the ranks of the workers into fragments, rendering them helpless and impotent on the industrial battlefield.

Separation of craft from craft renders industrial and financial solidarity impossible.

Union men scab upon union men; hatred of worker for worker is engendered, and the workers are delivered helpless and disintegrated into the hands of the capitalists.

Craft jealousy leads to the attempt to create trade monopolies.

Prohibitive initiation fees are established that force men to become scabs against their will. Men whom manliness or circumstances have driven from one trade are thereby fined when they seek to transfer membership to the union of a new craft.

Craft divisions foster political ignorance among the workers, thus dividing their class at the ballot box, as well as in the shop, mine and factory.

Craft unions may be and have been used to assist employers in the establishment of monopolies and the raising of prices. One set of workers are thus used to make harder the **[90]** conditions of life of another body of laborers.

Craft divisions hinder the growth of class consciousness of the workers, foster the idea of harmony of interests between employing exploiter and employed slave. They permit the association of the misleaders of the workers with the capitalists in the

Civic Federation, where plans are made for the perpetuation of capitalism, and the permanent enslavement of the workers through the wage system.

Previous efforts for the betterment of the working class have proven abortive because limited in scope and disconnected in action.

Universal economic evils afflicting the working class can be eradicated only by a universal working class movement. Such a movement of the working class is impossible while separate craft and wage agreements are made favoring the employer against other crafts in the same industry, and while energies are wasted in fruitless jurisdiction struggles which serve only to further the personal aggrandizement of union officials.

A movement to fulfill these conditions must consist of one great industrial union embracing all industries—providing for craft autonomy locally, industrial autonomy internationally, and working class unity generally.

It must be founded on the class struggle, and its general administration must be conducted in harmony with the recognition of the irrepressible conflict between the capitalist class and the working class.

It should be established as the economic organization of the working class, without affiliation with any political party.

All power should rest in a collective membership. [91]

Local, national and general administration, including union labels, buttons, badges, transfer cards,

initiation fees and per capita tax should be uniform throughout.

All members must hold membership in the local, national or international union covering the industry in which they are employed, but transfers of membership between unions, local, national or international, should be universal.

Workingmen bringing union cards from industrial unions in foreign countries should be freely admitted into the organization.

The general administration should issue a publication representing the entire union and its principles which should reach all members in every industry at regular intervals.

A central defense fund, to which all members contribute equally, should be established and maintained.

All workers, therefore, who agree with the principles herein set forth, will meet in convention at Chicago the 27th day of June, 1905, for the purpose of forming an economic organization of the working class along the lines marked out in this manifesto.

THE TREND TOWARD INDUSTRIAL FREEDOM.

By B. H. Williams.

(Written for the American Journal of Sociology).

"What kind of a world does the I. W. W. want?" Such, in substance, is the question asked of the writer by the editor of the American Journal of Sociology. Nothing would please me more than to attempt to draw a picture of that world; but space is too limited. I shall, therefore, indicate only some

[92] salient features of the I. W. W. forecast and program, which seem to me wholly in accord with scientific principles and facts, and therefore not to be successfully controverted.

In harmony with the theory and the established facts of evolution, the Industrial Workers of the World holds that the general tendency of the organism we call Society is progressive—that is, from lower or less finished forms and functions, to ever higher and more nearly finished forms and functions —approaching the infinity of perfection. In other words, Social Evolution differs in no essential respect from organic evolution.

Applying this evolutionary principle, we discover:

1. That this society which we call Capitalism is a more advanced form of the social organism than was any prior state. Its crowning achievement is the Age of Machinery, bringing into existence an enormous increase in wealth and in the capacity for producing the accessories of an ever-richer civilization; in short, transforming the face of Society in a manner undreamed of prior to its advent.

2. That the manner of producing the social wealth has evolved from an individual or small group form to an ever larger group form, embracing great industries and correlating these industries into what is approaching a world-system of production and exchange. In other words, machinery or the Machine Process has evolved Social Wealth Production, in which, generally speaking, all workers co-operate nationally and internationally in the creation and exchange of the accessories of civilization.

3. That the control or management of this system of production and exchange is not democratic, but autocratic—is in the hands of individuals or groups or capitalists, who claim absolute control over the product of labor as well as [93] absolute ownership of the natural resources and of the machinery of production. In brief, the system of ownership and control is in contradiction to the system of producing and exchanging wealth in accordance with the machine process.

4. That the contradiction aforementioned inevitably keeps alive and intensifies the class struggle between the owners or controllers, and the workers, in which struggle the latter seek (some consciously, some unconsciously) to remove the contradiction by eliminating autocratic, and substituting democratic, control as well as operation of the system of wealth production and distribution, and therefore of Society itself. To put it in another form: The most promising tendency that the I. W. W. discovers in modern society is that toward Industrial and Social Democracy.

This tendency, in our judgment, is the one that should be most emphasized, in the American thought both of the present and of the future. Its goal—the complete democratization of industry—means the freeing of the social organism from economic contradictions, whose social fruitage has been and is wars between nations, panics or industrial depressions, strikes, lockouts, riots, unemployment, long hours of toil, insufficient wages, excessive labor, prostitution, pauperism, many classes of crimes and

diseases, and other evidences of social malnutrition. It means a freer play of individuality, and the unfolding of a social initiative whose fecundity will make this old Mother Earth as near a paradise as can well be conceived of at present. And for all this and more, we shall still have to thank our old stepmother, Capitalism, for having made us rebels against her crudeness and barbarism. [94]

The I. W. W. wants the world for the workers, and none but workers in the world. "By organizing industrially, we (the workers) are forming the structure of the new society within the shell of the old." [95]

(Cover of Book of Songs:)

I. W. W.

SONGS

TO FAN THE FLAMES OF

DISCONTENT

Industrial Workers of the World Label

* I *

W * W

UNIVERSAL

Joe Hill

Memorial Edition

Published by

I. W. W. Publishing Bureau

1001 W. Madison St., Chicago, Ill.

U. S. A.

[Reverse Side:]

THE PREAMBLE

Of the Industrial Workers of the World

The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people and the few, who make up the employing class, have all the good things of life.

Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

We find that the centering of management of the industries into fewer and fewer hands makes the trade unions unable to cope with the ever growing power of the employing class. The trade unions foster a state of affiairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

These conditions can be changed and the interest of the working class upheld only by an organization formed in such a way that all its members in any one industry, or in all industries if necessary, cease work whenever a strike or lockout is on in any department thereof, thus making an injury to one an injury to all.

Instead of the conservative motto, "A fair day's

wage for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system."

It is the historic mission of the working class to do away with capitalism. The army of production must be organized, not only for the every-day struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old.

[Title Page:]

SONGS
OF THE WORKERS
ON THE ROAD
IN THE JUNGLES AND
IN THE SHOPS

Tenth Edition.

Chicago
I. W. W. Publishing Bureau
February, 1917 [96]

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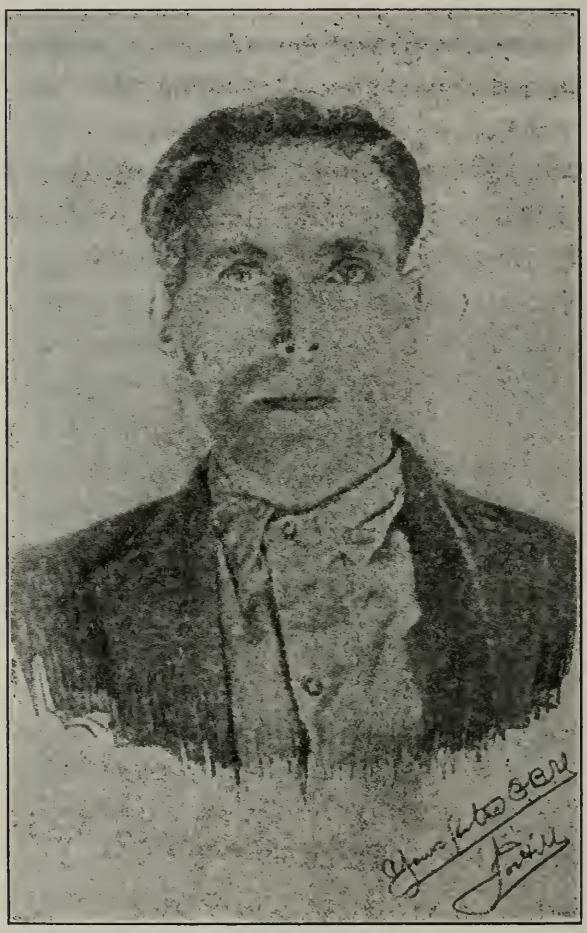

JOE HILL

Murdered by the Authorities of the State of Utah,
November the 19th, 1915

High head and back unbending—fearless and true,
Into the night unending; why was it you?

Heart that was quick with song, torn with their lead;
Life that was young and strong, shattered and dead.

Singer of manly songs, laughter and tears;
Singer of Labor's wrongs, joys, hopes and fears.

Though you were one of us, what could we do?
Joe, there were none of us needed like you.

We gave, however small, what Life could give;
We would have given all that you might live.

Your death you held as naught, slander and shame;
We from the very thought shrank as from flame.

Each of us held his breath, tense with despair,
You, who were close to Death, seemed not to care.

White-handed loathsome power, knowing no pause,
Sinking in labor's flower, murderous claws;

Boastful, with leering eyes, blood-dripping jaws . . .
Accurst be the cowardice hidden in laws!

Utah has drained your blood; white hands are wet;
We of the "surging flood" NEVER FORGET!

Our songster! have your laws now had their fill?
Know, ye, his songs and cause ye cannot kill?

High head and back unbending—"rebel true blue,"
Into the night unending; why was it you?

RALPH CHAPLIN. [98]

WORKERS OF THE WORLD AWAKEN!

By Joe Hill.

Workers of the world, awaken!
Break your chains, demand your rights.
All the wealth you make is taken
By exploiting parasites
Shall you kneel in deep submission
From your cradles to your graves?
Is the height of your ambition
To be good and willing slaves?

CHORUS.

Arise, ye prisoners of starvation!
Fight for your own emancipation;
Arise, ye slaves of every nation,
In One Union grand.
Our little ones for bread are crying,
And millions are from hunger dying;
The end the means is justifying,
'Tis the final stand.

If the workers take a notion,
They can stop all speeding trains;
Every ship upon the ocean
They can tie with mighty chains.
Every wheel in the creation,
Every mine and every mill,
Fleets and armies of the nation,
Will at their command stand still.

Join the union, fellow workers,
Men and women, side by side;
We will crush the greedy shirkers

Like a sweeping, surging tide;
For united we are standing,
But divided we will fall;
Let this be our understanding—
"All for one and one for all."

Workers of the world awaken!
Rise in all your splendid might;
Take the wealth that you are making,
It belongs to you by right.

1

No one will for bread be crying,
We'll have freedom, love and health,
When the grand red flag is flying
In the Workers' Commonwealth.

THE RED FLAG.

By James Connell.

The workers' flag is deepest red,
It shrouded oft our martyred dead;
And ere their limbs grew stiff and cold
Their life-blood dyed its every fold.

CHORUS

Then raise the scarlet standard high;
Beneath its folds we'll live and die,
Though cowards flinch and traitors sneer,
We'll keep the red flag flying here.

Look 'round, the Frenchman loves its blaze,
The sturdy German chants its praise;
In Moscow's vaults its hymns are sung,
Chicago swells its surging song.

It waved above our infant might
When all ahead seemed dark as night;
It witnessed many a deed and vow,
We will not change its color now.

It suits to-day the meek and base,
Whose minds are fixed on pelf and place;
To cringe beneath the rich man's frown,
And haul that sacred emblem down.

With heads uncovered, swear we all,
To bear it onward till we fall;
Come dungeons dark, or gallows grim,
This song shall be our parting hymn!

2 [99]

THE INTERNATIONALE.

By Eugene Pottier.

(Translated by Charles H. Kerr.)

Arise, ye prisoners of starvation!
Arise, ye wretched of the earth,
For justice thunders condemnation,
A better world's in birth.
No more tradition's chains shall bind us,
Arise, ye slaves; no more in thrall!
The earth shall rise on new foundations,
We have been naught, we shall be all.

REFRAIN.

'Tis the final conflict,
Let each stand in his place,
The Industrial Union
Shall be the human race.

We want no condescending saviors,
To rule us from a judgment hall;
We workers ask not for their favors;
Let us consult for all.
To make the thief disgorge his booty,
To free the spirit from its cell,
We must ourselves decide our duty,
We must decide and do it well.

The law oppresses us and tricks us,
Wage systems drain our blood;
The rich are free from obligations,
The laws the poor delude.
Too long we've languished in subjection,
Equality has other laws;
"No rights," says she, "without their duties,
No claims on equals without cause."

Behold them seated in their glory,
The kings of mine and rail and soil!
What have you read in all their story,
But how they plundered toil?

3

Fruits of the workers' toil are buried
In the strong coffers of a few;
In working for their restitution
The men will only ask their due.

Toilers from shops and fields united,
The union we of all who work;
The earth belongs to us, the workers,
No room here for the shirk.

How many on our flesh have fattened!
But if the noisome birds of prey
Shall vanish from the sky some morning,
The blessed sunlight still will stay.

THE BANNER OF LABOR.

(Tune: "The Star Spangled Banner.")

Oh, say, can you hear, coming near and more near,
The call now resounding: "Come all ye who labor?"
The industrial band throughout all the land
Bid toilers, remember each toiler his neighbor.
Come, workers, unite! 'tis Humanity's fight.
We call, you come forth in your manhood and might.

CHORUS

And the BANNER OF LABOR will surely soon wave
O'er the land that is free from the master and slave.
And the BANNER OF LABOR will surely soon wave
O'er the land that is free from the master and slave.

The blood and the lives of children and wives
Are ground into dollars for parasites' pleasure;
The children now slave, till they sink in their grave—
That robbers may fatten and add to their treasure.
Will you idly sit by, unheeding their cry?
Arise! Be ye men! See, the battle draws nigh!

Long, long has the spoil of labor and toil
Been wrung from the workers by parasite classes;
While Poverty gaunt, Desolation and Want
Have dwelt in the bowels of earth's toiling masses.
Through bloodshed and tears, our day star appears,
INDUSTRIAL UNION, the wage slave now cheers.

THE WORKERS' MARSEILLAISE.

Ye sons of toil, awake to glory!
Hark, hark, what myriads bid you rise;
Your children, wives and grandsires hoary—
Behold their tears and hear their cries!
Behold their tears and hear their cries!
Shall hateful tyrants mischief breeding,
With hireling hosts, a ruffian band—
Affright and desolate the land,
While peace and liberty lie bleeding?

CHORUS

To arms! to arms! ye brave!
Th' avenging sword unsheathe!
March on, march on, all hearts resolved
On Victory or Death.

With luxury and pride surrounded,
The vile, insatiate despots dare,
Their thirst for gold and power unbounded
To mete and vend the light and air,
To mete and vend the light and air,
Like beasts of burden, would they load us,
Like gods would bid their slaves adore,
But man is man, and who is more?
Then shall they longer lash and goad us?

O, Liberty! can man resign thee?
Once having felt thy generous flame,
Can dungeon's bolts and bars confine thee?
Or whips, thy noble spirit tame?
Or whips, thy noble spirit tame?
Too long the world has wept bewailing,

That Falsehood's dagger tyrant wield;
But Freedom is our sword and shield;
And all their arts are unavailing!

You starving member of the unemployed. Why starve? We have produced enough. The warehouses are overflowing with the things we need. WHY STARVE?

5

SHOULD I EVER BE A SOLDIER.

By Joe Hill

(Tune: "Colleen Bawn")

We're spending billions every year
For guns and ammunition,
"Our Army" and "Our Navy" dear,
To keep in good condition;
While millions live in misery
And millions died before us,
Don't sing "My Country, 'tis of thee,"
But sing this little chorus.

CHORUS

Should I ever be a soldier,
'Neath the Red Flag I would fight;
Should the gun I ever shoulder,
It's to crush the tyrant's might.
Join the army of the toilers,
Men and women fall in line,
Wage slaves of the world! Arouse!
Do your duty for the cause,
For Land and Liberty.

And many a maiden, pure and fair,
Her love and pride must offer
On Mammon's altar in despair,
To fill the Master's coffer,
The gold that pays the mighty fleet,
From tender youth he squeezes,
While brawny men must walk the street
And face the wintry breezes.

Why do they mount their gatling gun
A thousand miles from ocean,
Where hostile fleet could never run—
Ain't that a funny notion?
If you don't know the reason why
Just strike for better wages,
And then, my friends—if you don't die—
You'll sing this song for ages.

6 [101]

HARVEST WAR SONG.

By Pat Brennan

(Tune: "Tipperary")

We are coming home, John Farmer; we are coming back to stay.
For nigh on fifty years or more, we've gathered up your hay.
We have slept out in your hayfields, we have heard your morning shout;
We've heard you wondering where in hell's them pesky go-abouts?

CHORUS

It's a long way, now understand me; it's a long way to town;
It's a long way across the prairie, and to hell with Farmer John.
Up goes machine or wages, and the hours must come down;
For we're out for a winter's stake this summer, and we want no scabs around.

You've paid the going wages, that's what kept us on the bum,
You say you've done your duty, you chin-whiskered son of a gun.
We have sent your kids to college, but still you must rave and shout,
And call us tramps and hoboes, and pesky go-abouts.

But now the wintry breezes are a-shaking our poor frames,
And the long drawn days of hunger try to drive us boes insane.
It is driving us to action—we are organized today;
Us pesky tramps and hoboes are coming back to stay.

Every worker should have an ambition to live to be a healthy old man or woman and hear the whistle blow for the bosses to go to work.

WHAT WE WANT.

By Joe Hill

(Tune: "Rainbow")

We want all the workers in the world to organize
Into a great big union grand
And when we all united stand
The world for workers we'll demand
If the working class could only see and realize
What mighty power labor has
Then the exploiting master class
It would soon fade away.

CHORUS

Come all ye toilers that work for wages,
Come from every land,
Join the fighting band,
In one union grand,
Then for the workers we'll make upon this earth a paradise,
When the slaves get wise and organize.

We want the sailor and the tailor and the lumberjacks,
And all the cooks and laundry girls,
We want the guy that dives for pearls,
The pretty maid that's making curls,
And the baker and the staker and the chimneysweep,
We want the man that's slinging hash,
The child that works for little cash
In one union grand.

We want the tinner and the skinner and the chamber-
maid,
We want the man that spikes on soles,
We want the man that's digging holes,
We want the man that's climbing poles,
And the trucker and the mucker and the hired man
And all the factory girls and clerks,
Yes, we want every one that works,
In one union grand.

8 **[102]**

WORKINGMEN, UNITE!

By E. S. Nelson.

(Tune: "Red Wing.")

Conditions they are bad,
And some of you are sad;
You cannot see your enemy,
The class that lives in luxury,—
You workingmen are poor,—
Will be forevermore,—
As long as you permit the few
To guide your destiny.

Shall we still be slaves and work for wages?
It is outrageous—has been for ages;
This earth by right belongs to toilers,
And not to spoilers of liberty.

The master class is small,
But they have lots of "gall,"
When we unite to gain our right,
If they *they* resist we'll use our might;

There is no middle ground,
This fight must be one round
To victory, for liberty;
Our class is marching on!

Workingmen, unite!
We must put up a fight,
To make us free from slavery
And capitalistic tyranny;
This fight is not in vain,
We've got a world to gain;
Will you be a fool, a capitalist tool,
And serve your enemy?

Our Country? The country of millions of hunted, homeless, hungry slaves! The country of Colorado, Louisiana, Texas, Michigan, Pennsylvania, West Virginia and all the other innumerable scenes of labor's shambles? Not OUR country.

9

SCISSOR BILL.

By Joe Hill.

(Tune: "Steamboat Bill.")

You may ramble 'round the country anywhere you will,
You'll always run across the same old Scissor Bill.
He's found upon the desert, he is on the hill,
He's found in every mining camp and lumber mill.
He looks just like a human, he can eat and walk,
But you will find he isn't when he starts to talk.
He'll say, "This is my country," with an honest face,
While all the cops they chase him out of every place.

CHORUS

Scissor Bill, he is a little dippy,
Scissor Bill, he has a funny face.
Scissor Bill should drown in Mississippi,
He is the missing link that Darwin tried to trace.
And Scissor Bill, he couldn't live without the booze,
He sits around all day and spits tobacco juice.
He takes a deck of cards and tries to beat the Chink!
Yes, Bill would be a smart guy if he only could think.

And Scissor Bill, he says: "This country must be freed
From Niggers, Japs and Dutchmen and the gol durn Swede."
He says that every cop would be a native son
If it wasn't for the Irishman, the sonna fur gun.

CHORUS

Scissor Bill, the "foreigners" is cussin';
Scissor Bill, he says: "I hate a Coon";
Scissor Bill is down on everybody—
The Hottentots, the bushmen and the man in the moon.

Don't try to talk your union dope to Scissor Bill,
He says he never organized and never will.
He always will be satisfied until he's dead,
With coffee and a doughnut and a lousy old bed.
And Bill, he says he gets rewarded thousand fold,
When he gets up to Heaven on the streets of gold.
But I don't care who knows it, and right here I'll tell,
If Scissor Bill is goin' to Heaven, I'll go to Hell.

CHORUS

Scissor Bill, he wouldn't join the union,
Scissor Bill, he says, "Not me, by Heck!"
Scissor Bill gets his reward in Heaven,
Oh! sure. He'll get it, but he'll get in the neck.

10 [103]

A DREAM.

By Richard Brazier.

(Tune: "The Holy City.")

One day as I lay dreaming, this vision came to me:
I saw an army streaming, singing of liberty;
I marked these toilers passing by, I listened to their cry.
It was a triumphant anthem—an anthem filled with joy;
It was a triumphant anthem—an anthem filled with joy.

CHORUS

One union, industrial union;
Workers of the world unite,
To make us free from slavery
And gain each man his right.

I saw the ruling classes watching this grand array
Of marching, toiling masses passing on their way;
With pallid cheeks and trembling limbs they gazed upon this throng,
And ever as they marched along the workers sang the song;
And ever as they marched along the workers sang the song:

CHORUS

Methought I heard the workers call to that ruling band—
Come into our ranks, ye shirkers, for we now rule this land.
Work or starve, the workers said, for you must earn your bread.
Then into their ranks came the masters and joined the workers' song;
Then into their ranks came the masters and joined the workers' song.

All workers, "The Army of Production," in One Big Union, regardless of age, creed, color or sex, is invincible.

Labor is entitled to all it produces. An injury to one is an injury to all.

11

THE TRAMP.

By Joe Hill.

(Tune: "Tramp, Tramp, Tramp, the Boys Are Marching.")

If you will shut your trap,
I will tell you 'bout a chap,
That was broke and up against it, too, for fair;
He was not the kind that shirk,
He was looking hard for work,
But he heard the same old story everywhere.

CHORUS

Tramp, tramp, tramp, keep on a-tramping,
Nothing doing here for you;
If I catch you 'round again,
You will wear the ball and chain,
Keep on tramping, that's the best thing you can do.

He walked up and down the street,
'Till the shoes fell off his feet.
In a house he spied a lady cooking stew,
And he said, "How do you do;
May I chop some wood for you?"
What the lady told him made him feel so blue.

CHORUS

'Cross the street a sign he read,
"Work for Jesus," so it said,
And he said, "Here is my chance, I'll surely try,"
And he kneeled upon the floor,
'Till his knees got rather sore,
But at eating-time he heard the preacher cry—

CHORUS

Down the street he met a cop,
And the copper made him stop,
And he asked him, "When did you blow into town?
Come with me to the judge."
But the judge he said, "Oh fudge,
Bums that have no money needn't come around."

CHORUS

Finally came that happy day
When his life did pass away,

He was sure he'd go to heaven when he died,
When he reached the pearly gate,
Santa Peter, mean old skate,
Slammed the gate right in his face and loudly cried:

12 **[104]**

WE COME.

(Air: "Toreador Song.")

Workers, the World!
The Masters call in vain.
Though ground down pitiless,
We rise again;
And to the call of millions crying from the depths,
We shout our message to man—
And from the hearts of all the land
Comes loud and clear
The answering call,
"We Come."

Workers, be brave;
Through nights of toil and pain,
Oppression and slavery,
Priest, gun and chain,
Law and the bribings of a cruel, despotic class,
We march and sing our refrain—
Singing hopes of a million slaves:
"Workers, unite.
Unite."
Workers, be strong;
They offer bribes in vain,
Promise and trick us,

Keep us enchained;
But to humanity's call we answering come,
Chanting our far flung refrain—
And from the hearts of all the land
Comes loud and clear
The answer to us,
Workers, unite,
"We come."
Workers, the World!
Though Masters call in vain,
Grind us down pitiless,
We'll rise again.
And to the call of millions crying from the depths
We fling our challenge for right—
And from the hearts of all the land
Comes loud and clear
The answering call,
"We Come!"

13

THE PREACHER AND THE SLAVE.

By Joe Hill.

(Tune: "Sweet Bye and Bye")

Long-haired preachers come out every night,
Try to tell you what's wrong and what's right;
But when asked how 'bout something to eat
They will answer with voices so sweet:

CHORUS

You will eat, bye and bye,
In that glorious land above the sky;
Work and pray, live on hay,
You'll get pie in the sky when you die.

And the starvation army they play,
And they sing and they clap and they pray
Till they get all your coin on the drum,
Then they'll tell you when you're on the bum:

Holy Rollers and jumpers come out,
And they holler, they jump and they shout.
"Give your money to Jesus," they say,
"He will cure all diseases today."

If you fight hard for children and wife—
Try to get something good in this life—
You're a sinner and bad man, they tell,
When you die you will sure go to hell.

Workingmen of all countries, unite,
Side by side we for freedom will fight:
When the world and its wealth we have gained
To the grafters we'll sing this refrain:

LAST CHORUS.

You will eat, bye and bye,
When you've learned how to cook and to fry
Chop some wood, 'twill do you good,
And you'll eat in the sweet bye and bye.

14 [105]

THEY ARE ALL FIGHTERS.

By Richard Brazier.

(Tune: "San Antonio.")

There is a bunch of honest workingmen;
They're known throughout the land.
They've seen the horrors of the bull-pen,

From Maine to the Rio Grande.
They've faced starvation, hunger, privation;
Upon them the soldiers were hurled.
Their organization is known to the nation
As the Industrial Workers of the World.
Then hail to this fighting band!
Good luck to their union grand!

They're all fighters from the word go,
And to the master
They'll bring disaster.
And if you'll join them
They'll let you know
Just the reason the boss must go.

They've faced the Pinkertons and Gatling guns
In defense of their natural rights;
They proved themselves to be labor's sons
In all of the workers' fights;
They have been hounded by power unbounded
Of capitalists throughout the land,
But all are astounded, our foes are confounded
For we still remain a union grand.
Then hail to this fighting band!
Good luck to their union grand!

You live on coffee and on doughnuts;
The Boss lives on porterhouse steak.
You work ten hours a day and live in huts;
The Boss lives in the palace you make.
You face starvation, hunger privation,
But the Boss is always well fed.

Though of low station, you've built this nation—
Built it upon your dead.
Then when will you ever get wise;
When will you open your eyes?

15

THERE IS POWER IN A UNION.

By Joe Hill

(Tune: "There is Power in the Blood")

Would you have freedom from wage slavery,
Then join in the grand Industrial band;
Would you from mis'ry and hunger be free,
Then come! Do your share, like a man.

CHORUS

There is pow'r, there is pow'r
In a band of workingmen,
When they stand hand in hand,
That's a pow'r, that's a pow'r
That must rule in every land—
One Industrial Union Grand.

Would you have mansions of gold in the sky,
And live in a shack, way in the back?
Would you have wings up in heaven to fly,
And starve here with rags on your back?

If you've had "nuff" of the blood of the lamb,"
Then join in the grand Industrial band;
If, for a change, you would have eggs and ham,
Then come, do your share, like a man.

If you like sluggers to beat off your head,
Then don't organize, all unions despise,
If you want nothing before you are dead,
Shake hands with your boss and look wise.

Come, all ye workers, from every land,
Come, join in the grand Industrial band,
Then we our share of this earth shall demand.
Come on! Do your share, like a man.

"Why should one man's belly be empty when ten men can produce enough to feed a hundred?"

16 [106]

TA-RA-RA- BOMM DE-AY

By Joe Hill.

I had a job once threshing wheat, worked sixteen hours with hands and feet.
And when the moon was shining bright, they kept me working all the night.
One moonlight night, I hate to tell, I "accidentally" slipped and fell.
My pitchfork went right in between some cog wheels of that thresh-machine.

CHORUS

Ta-ra-ra boom-de-ay!
It made a noise that way,
And wheels and bolts and hay,
Went flying every way.
That stingy rube said, "Well!

A thousand gone to hell."
But I did sleep that night,
I needed it all right.

Next day that stingy rube did say, "I'll bring my eggs to town to-day;
You grease my wagon up, you mutt, and don't forget to screw the nut."
I greased his wagon all right, but I plumb forgot to screw the nut,
And when he started on that trip, the wheel slipped off and broke his hip.

SECOND CHORUS

Ta-ra-ra-boom-de-ay!
It made a noise that way,
That rube was sure a sight,
And mad enough to fight;
His whiskers and his legs
Were full of scrambled eggs:
I told him, "That's too bad—
I'm feeling very sad."

17

And then that farmer said, "You turk! I bet you are an I-Won't Work."
He paid me off right there, By Gum! So I went home and told my chum.
Next day when threshing did commence, my chum was Johnny on the fence;
And 'pon my word, that awkward kid, he dropped his pitchfork, like I did.

THIRD CHORUS.

Ta-ra-ra-boom-de-ay!
It made a noise that way,
And part of that machine
Hit Rueben on the bean.
He cried, "Oh me, oh my;
I nearly lost my eye."
My partner said, "You're right—
It's bedtime now, good night."

But still that rube was pretty wise, these things did open up his eyes.
He said, "There must be something wrong; I think I work my men too long."
He cut the hours and raised the pay, gave ham and eggs for every day,
Now gets his men from union hall, and has no "accidents" at all.

FOURTH CHORUS

Ta-ra-ra-boom-de-ay!
That rube is feeling gay;
He learned his lesson quick,
Just through a simple trick.
For fixing rotten jobs
And fixing greedy slobs,
This is the only way,
Ta-ra-ra-boom-de-ay!

Education is ammunition. Organization the weapon. Aim true and keep your powder dry.

HOLD THE FORT

(English Transport Workers' Strike Song)

We meet today in Freedom's cause,
And raise our voices high;
We'll join our hands in union strong,
To battle or to die.

CHORUS

Hold the fort for we are coming—
Union men, be strong.
Side by side we battle onward,
Victory will come.

Look, my Comrades, see the union
Banners waving high.
Reinforcements now appearing,
Victory is nigh.

See our numbers still increasing;
Hear the bugle blow.
By our union we shall triumph
Over every foe.

Fierce and long the battle rages,
But we will not fear.
Help will come whene'er it's needed,
Cheer, my Comrades, cheer.

THE NINETY AND NINE

By Rose Elizabeth Smith

(Tune: "Ninety and Nine")

There are ninety and nine that work and die,
In hunger and want and cold,
That one may revel in luxury,

And be lapped in the silken fold.
And ninety and nine in their hovels bare,
And one in a palace of riches rare.

From the sweat of their brow the desert blooms
And the forest before them falls;

19

Their labor has builded humble homes,
And cities with lofty halls;
And the one owns cities and houses and lands
And the ninety and nine have empty hands.

But the night so dreary and dark and long,
At last shall the morning bring;
And over the land the victor's song
Of the ninety and nine shall ring,
And echo afar, from zone to zone,
"Rejoice! for Labor shall have its own."

THE ROAD TO EMANCIPATION

By Lone Wolf

(Tune: "Tipperary")

Now, workingmen, you know you live a life of misery,
So join the union of your class, determined to be free.
Don't let the master gouge your lives for many years to come,
But organize upon the job and put him on the bum.

CHORUS

It's the road to Emancipation, it's the right way to go;

For the toilers to run the nation and the world, both high and low.
Kick in, and do your duty; for it's up to you and me—
It's the One Big Union of the Workers that will bring prosperity.

Don't be a meek and lowly slave like lots of those you meet;
Don't be a servile scissor bill and lick the bosses' feet.
Don't let them starve you off the earth, don't fear their prison cell,
Make your laws in the union hall—the rest can go to hell.

Now, workingmen, the masters they have no more jobs to give;
You must form the taking habit if you ever wish to live.
Postponing meals is suicide on the installment plan,
So organize to get the goods, and take them like a man.

20 [108]

MR. BLOCK

By Joe Hill

(Air: "It Looks To Me Like a Big Time Tonight")
Please give me your attention, I'll introduce to you
A man that is a credit to "Our Red, White and Blue";
His head is made of lumber, and solid as a rock;

He is a common worker and his name is Mr. Block.
And Block he thinks he may
Be President some day.

CHORUS

Oh, Mr. Block, you were born by mistake,
You take the cake,
You make me ache.
Tie on a rock to your block and then jump in the lake,
Kindly do that for Liberty's sake.

Yes, Mr. Block is lucky; he found a job, by gee!
The sharks got seven dollars, for job and fare and fee.
They shipped him to a desert and dumped him with his truck,
But when he tried to find his job, he sure was out of luck.
He shouted, "That's too raw,
I'll fix them with the law."

Block hiked back to the city, but wasn't doing well.
He said, "I'll join the union—the great A. F. of L."
He got a job next morning, got fired in the night,
He said, "I'll see Sam Gompers and he'll fix that foreman right."
Sam Gompers said, "You see,
You've got our sympathy."

Election day he shouted, "A Socialist for Mayor!"
The "comrade" got elected, he happy was for fair,
But after the election he got an awful shock,

A great big socialistic Bull did rap him on the block.
And Comrade Block did sob,
"I helped him to his job."

21

The money kings in Cuba blew up the gunboat Maine,
But Block got awful angry and blamed it all on Spain.
He went right in the battle and there he lost his leg,
And now he's peddling shoestrings and is walking on a peg.
He shouts, "Remember Maine,
Hurrah! To hell with Spain!"

Poor Block he died one evening, I'm very glad to state,
He climbed the golden ladder up to the pearly gate.
He said, "Oh, Mr. Peter, one word I'd like to tell,
I'd like to meet the Astorbilts and John D. Rockefell."
Old Pete said, "Is that so?
You'll meet them down below."

STAND UP! YE WORKERS

By Ethel Comer

(Air: "Stand Up for Jesus")

Stand up! Stand up! Ye workers;
Stand up in all your might.
United beneath our banner,
For Liberty and right.
From victory unto victory
This army sure will go,
To win the world for labor
And vanquish every foe.

Stand up! Stand up! Ye workers;
Stand up in every land.
Unite, and fight for freedom,
In ONE BIG UNION grand.
Put on the workers' armor,
Which is the card of Red,
Then all the greedy tyrants
Will have to earn their bread.

Arouse! Arouse! Ye toilers,
The strife will not be long.
This day the noise of battle,
The next the victor's song.
All ye that slave for wages,
Stand up and break your chain:
Unite in ONE BIG UNION—
You've got a world to gain.

22 [109]

CHRISTIANS AT WAR

By John F. Kendrick

(Tune: "Onward, Christian Soldiers")

Onward, Christian soldiers! Duty's way is plain:
Slay your Christian neighbors, or by them be slain.
Pulpiteers are spouting effervescent swill,
God above is calling you to rob and rape and kill,
All your acts are sanctified by the Lamb on high;
If you love the Holy Ghost, go murder, pray and die.

Onward, Christian soldiers, rip and tear and smite!
Let the gentle Jesus, bless your dynamite.
Splinter skulls with shrapnel, fertilize the sod;

Folks who do not speak your tongue, deserve the curse of God.
Smash the doors of every home, pretty maidens seize;
Use your might and sacred right to treat them as you please.

Onward, Christian soldiers! Eat and drink your fill;
Rob with bloody figures, Christ O. K.'s the bill,
Steal the farmer's savings, take their grain and meat;
Even though the children starve, the Savior's bums must eat.
Burn the peasant's cottages, orphans leave bereft;
In Jehovah's holy name, wreak ruin right and left.

Onward, Christian soldiers! Drench the land with gore;
Mercy is a weakness all the gods abhor.
Bayonet the babies, jab the mothers, too;
Hoist the cross of Calvary to hallow all you do.
File your bullets' noses flat, poison every well;
God decrees your enemies must all go plumb to hell.

Onward, Christian soldier! Blighting all you meet,
Trampling human freedom under pious feet.
Praise the Lord whose dollar sign dupes his favored race!
Make the foreign trash respect your bullion brand of grace.
Trust in mock salvation, serve as pirates' tools;
History will say of you: "That pack of G— d— fools."

WORKERS OF THE WORLD.

(Air: "Lillibulero")

By Connell.

Stand up, ye toilers, why crouch ye like cravens?
Why clutch an existence of insult and want?
Why stand to be plucked by an army of ravens,
Or hoodwink'd forever by twaddle and cant?
Think of the wrongs ye bear,
Think of the rags ye wear,
Think on the insults endur'd from your birth;
Toiling in snow and rain,
Rearing up heaps of grain,
All for the tyrants who grind you to earth.

Your brains are as keen as the brains of your masters,
In swiftness and strength ye surpass them by far;
Ye've brave hearts to teach you to laugh at disasters,
Ye vastly outnumber your tyrants in war.
Why, then, like cowards stand,
Using not brain or hand,
Thankful like dogs when they throw you a bone?
What right have they to take
Things that ye toil to make?
Know ye not, workers, that all is your own?

Rise in your might, brothers, bear it no longer;
Assemble in masses throughout the whole land;
Show these incapables who are the stronger
When workers and idlers confronted shall stand.
Thro' Castle, Court and Hall,
Over their acres all,

Onwards we'll press like waves of the sea,
Claiming the wealth we've made,
Ending the spoiler's trade;
Labor shall triumph and mankind be free.

"War is Hell" for the workers. Let us make the Class War a nightmare for the masters.

"The poor—is any country his? What are to me your glories and your industries—they are not mine."

24 [110]

SOLIDARITY FOREVER

By Ralph H. Chaplin

(Tune: "John Brown's Body")

When the Union's inspiration through the worker's blood shall run,
There can be no power greater anywhere beneath the sun,
Yet what force on earth is weaker than the feeble strength of one?
But the Union makes us strong.

CHORUS

Solidarity forever!
Solidarity forever!
Solidarity forever!
For the Union makes us strong.

Is there aught we hold in common with the greedy parasite
Who would lash us into serfdom and would crush us with his might?

Is there anything left for us but to organize and fight?
For the Union makes us strong.
It is we who plowed the prairies; built the cities where they trade,
Dug the mines and built the workshops; endless miles of railroad laid.
Now we stand, outcast and starving, 'mid the wonders we have made;
But the Union makes us strong.

All the world that's owned by idle drones, is ours and ours alone.
We have laid the wide foundations; built it skywards, stone by stone.
It is ours, and not to slave in, but to master and to own,
While the Union makes us strong.

They have taken untold millions that they never toiled to earn.
But without our brain and muscle not a single wheel can turn.
We can break their haughty power; gain our freedom, when we learn
That the Union makes us strong.

25

In our hands is placed a power greater than their hoarded gold;
Greater than the might of armies, magnified a thousand fold.
We can bring to birth the new world from the ashes of the old,
For the Union makes us strong.

THE WHITE SLAVE

By Joe Hill

(Air: "Meet Me Tonight in Dreamland")

One little girl, fair as a pearl,
Worked every day in a laundry;
All that she made for food she paid,
So she slept on a park bench so soundly;
An old procuress spied her there,
She came and whispered in her ear:

CHORUS

Come with me now, my girly,
Don't sleep out in the cold;
Your face and tresses curly
Will bring you fame and gold,
Automobiles to ride in, diamonds and silk to wear,
You'll be a star bright, down in the red light,
You'll make your fortune there.

Same little girl, no more a pearl,
Walks all alone 'long the river,
Five years have flown, her health is gone,
She would look at the water and shiver,
Whene'er she'd stop to rest and sleep,
She'd hear a voice call from the deep:

CHORUS

Girls in this way, fall every day,
And have been falling for ages,
Who is to blame? You know his name,
It's the boss that pays starvation wages.
A homeless girl can always hear
Temptations calling everywhere.

CHORUS

OVERALLS AND SNUFF

(Tune: "Wearing of the Green")

One day as I was walking along the railroad track,
I met a man in Wheatland with his blankets on his back,
He was an old-time hop picker, I'd seen his face before,
I knew he was a wobbly, by the button that he wore.

By the button that he wore, by the button that he wore,
I knew he was a wobbly, by the button that he wore.

He took his blankets off his back and sat down on the rail
And told us some sad stories 'bout the workers down in jail.
He said the way they treat them there, he never saw the like,
For they're putting men in prison just for going out on strike,
Just for going out on strike, just for going out on strike,
They're putting men in prison, just for going out on strike.

They have sentenced Ford and Suhr, and they've got them in the pen,
If they catch a wobbly in their burg, they vag him there and then.
There is one thing I can tell you, and it makes the bosses sore,
As fast as they can pinch us, we can always get some more.

We can always get some more, we can always get some more,
As fast as they can pinch us, we can always get some more.

Oh, Horst and Durst are mad as hell, they don't know what to do.
And the rest of those hop barons are all feeling mighty blue.
Oh, we've tied up all their hop fields, and the scabs refuse to come,
And we're going to keep on striking till we put them on the bum.
Till we put them on the bum, till we put them on the bum,
We're going to keep on striking till we put them on the bum.

27

Now we've got to stick together, boys, and strive with all our might,
We must free Ford and Suhr, boys, we've got to win this fight.
From these scissor bill hop barons we are taking no more bluff,
We'll pick no more damned hops for them, for overalls and snuff.
For our overalls and snuff, for our overalls and snuff,
We'll pick no more damned hops for them, for overalls and snuff.

DON'T TAKE MY PAPA AWAY FROM ME

Words and Music by Joe Hill

(*Written just before his execution*)

A little girl with her father stayed, in a cabin across the sea,
Her mother dear in the cold grave lay; with her father she's always be—
But then one day the great war broke out and the father was told to go;
The little girl pleaded—her father she needed.
She begged, cried and pleaded so:

CHORUS

Don't take my papa away from me, don't leave me there all alone.
He has cared for me so tenderly, ever since mother was gone.
Nobody ever like him can be, no one can so with me play.
Don't take my papa away from me; please don't take papa away.

Her tender pleadings were all in vain, and her father went to the war.
He'll never kiss her good night again, for he fell 'mid the cannon's roar.
Greater a soldier was never born, but his brave heart was pierced one day;
And as he was dying, he heard some one crying,
A girl's voice from far away:

CHORUS

THE HOPE OF THE AGES

By E. Nesbit

(Tune: "Three Cheers for the Red, White and Blue")

If you dam up the river of progress—
At your peril and cost let it be;
That river must seawards despite you—
'Twill break down your dams and be free;
And we heed not the pitiful barriers
That you in its way have downcast;
For your efforts but add to the torrent,
Whose flood must overwhelm you at last.

CHORUS

For our banner is rais'd and unfurled;
At your head our defiance is hurled;
Our cry is the cry of the ages—
Our hope is the hope of the world.

We laugh in the face of the forces
That strengthen the flood they oppose;
For the harder oppression the fiercer
The current will be when it flows.
We shall win, and the tyrant's battalions
Will scatter like chaff in the fight,
From which the true Soldiers of Freedom
Shall gather new courage and might.

Whether leading the van of the fighters,
In bitterest stress of the strife;
Or patiently bearing the burden
Of changelessly commonplace life,
One hope we have ever before us,
Our aim to attain and fulfill,

One watchword we cherish to mark us,
One kindred and brotherhood still.

What matter if failure on failure
Crowd closely upon us and press?
When a hundred have bravely been beaten
The hundred and first wins success.
Our watchword is "Freedom"; new soldiers
Flock each day where her flag is unfurled,
Our cry is the cry of the ages,
Our hope is the hope of the world.

29

STUNG RIGHT

By Joe Hill

(Air: "Sunlight, Sunlight")

When I was hiking 'round the town to find a job one day,
I saw a sign "A thousand men are wanted right away,"
To take a trip around the world in Uncle Sammy's fleet,
I signed my name a dozen times upon a great big sheet.

CHORUS

Stung right, stung right, S–T–U–N–G,
Stung right, stung right, E. Z. Mark, that's me;
When my term is over, and again I'm free,
There'll be no more trips around the world for me.

The man he said, "The U. S. fleet, that is no place for slaves,
The only thing you have to do is stand and watch the waves."

But in the morning, five o'clock, they woke me from
my snooze,
To scrub the deck and polish brass and shine the
captain's shoes.

One day a dude in uniform to me commenced to
shout,
I simply plugged him in the jaw and knocked him
down and out;
They slammed me right in irons then and said, "You
are a case."

On bread and water then I lived for twenty-seven
days.
One day the captain said, "To-day I'll show you
something nice,
All hands line up, we'll go ashore and have some
exercise."
He made us run for seven miles as fast as we could
run,
And with a packing on our back that weighed a half
a ton.

Some time ago when Uncle Sam he had a war with
Spain,
And many of the boys in blue were in the battle
slain,
Not all were killed by bullets, though; no, not by any
means,
The biggest part that died were killed by Armour's
Pork and Beans.

THE OPTIMISTIC LABORITES

By John F. Kendrick

(Tune: "The Harp That Once Through Tara's Halls")

We'll sing the praise of future days,
The happy times to be,
When every man shall guard the plan
That every man be free.
We have no ties beyond the skies,
Our loves and hopes are here;
No holy fool can make us drool
The dismal hymns of fear.

With ready hand we take our stand
To hope and work and fight;
And while we live, our strength we'll give
For liberty and right.
We make all wealth, conserve all health,
By cunning craft and trade;
We bring all joys, for we're the boys
Of hammer, brush and spade.

Then live the part that warms the heart,
And wakens manhood's pride:
All Nature's laws confirm the cause
For which our comrades died.
Some day we'll own the fields we've sown,
When hunger's rule is past;
No child shall slave to feed a knave,
When man is free at last.

THE "BLANKET STIFF"

He built the road,
With others of his class he built the road,
Now o'er it, many a weary mile, he packs his load,
Chasing a job, spurred on by hunger's goad,
He walks and walks and walks and walks
And wonders why in Hell he built the road.

31

CASEY JONES—THE UNION SCAB

By Joe Hill

The Workers on the S. P. line to strike sent out a call;
But Casey Jones, the engineer, he couldn't strike at all;
His boiler it was leaking, and its drivers on the bum,
And his engine and its bearings, they were all out of plumb.

CHORUS

Casey Jones kept his junk pile running;
Casey Jones was working double time;
Casey Jones got a wooden medal,
For being good and faithful on the S. P. line.

The Workers said to Casey: "Won't you help us win this strike?"
But Casey said: "Let me alone, you'd better take a hike."
Then some one put a bunch of railroad ties across the track,
And Casey hit the river with an awful crack.

Casey Jones hit the river bottom;
Casey Jones broke his blooming spine,
Casey Jones was an Angeleno,
He took a trip to heaven on the S. P. line.

When Casey Jones got up to heaven to the Pearly Gate,
He said: "I'm Casey Jones, the guy that pulled the S. P. freight."
"You're just the man," said Peter; "our musicians went on strike;
You can get a job a-scabbing any time you like."

Casey Jones got a job in heaven;
Casey Jones was doing mighty fine;
Casey Jones went scabbing on the angels,
Just like he did to workers on the S. P. line.

The angels got together, and they said it wasn't fair,
For Casey Jones to go around a-scabbing everywhere.
The Angels' Union No. 23, they sure were there,
And they promptly fired Casey down the Golden Stair.

Casey Jones went to Hell a-flying.
"Casey Jones," the Devil said, "Oh fine;
Casey Jones, get busy shoveling sulphur;
That's what you get for scabbing on the S. P. line."

IT IS THE UNION

By Richard Brazier

(Tune: "We Have a Navy")

Sing a song in praise of toiling masses,
Sing a song about our sons of toil;
Sing of wrongs done to the working classes,
Wrongs that make our hearts boil.
We have always borne the blows and lashes—
No more we'll patient stand,
But on every hand, throughout this splendid land,
We sons of toil will make our stand.
Then in our glory will we tower,
What will be the secret of our power?

CHORUS

It is the Union, the Industrial Union—
Our banner is unfurled.
We will unite in all our splendid might
In the Industrial Workers of the World.
We have a union, a fighting union,
And our masters know that, too.
It will keep them in their place
When they know they have to face
Our union of workingmen that's true.

For countless years and ages we've been enslaved
Beneath the capitalistic rule;
We, the strong, cringing to those men depraved.
In whose hands we have ever been a tool.
But the day of liberty is dawning—
Freedom now draws nigh.
We must unite to win the fight—

Wage slavery then will die.
Then in our glory will we tower;
Great will be the workers' power.

An eight-hour day for all employed workers would put thousands of the unemployed to work.

33

WE WILL SING ONE SONG

By Joe Hill

(Air: "My Old Kentucky Home")

We will sing one song of the meek and humble slave,
The horn-handed son of the toil,
He's toiling hard from the cradle to the grave,
But his master reaps the profits from his toil.
Then we'll sing one song of the greedy master class,
They're vagrants in broadcoth, indeed,
They live by robbing the ever-toiling mass,
Human blood they spill to satisfy their greed.

CHORUS

Organize! Oh, toilers, come organize your might;
Then we'll sing one song of the workers' commonwealth.
Full of beauty, full of love and health.

We will sing one song of the politician sly,
He's talking of changing the laws;
Election day all the drinks and smokes he'll buy,
While he's living from the sweat of your brow.
Then we'll sing one song of the girl below the line,
She's scorned and despised everywhere,

While in their mansions the "keepers" wine and dine
From the profits that immortal traffic bear.

We will sing one song of the preacher, fat and sleek,
He tells you of homes in the sky.
He says, "Be generous, be lowly, and be meek,
If you don't you'll sure get roasted when you die."
Then we'll sing one song of the poor and ragged tramp,
He carries his home on his back;
Too old to work, he's not wanted 'round the camp,
So he wanders without aim along the track.

We will sing one song of the children in the mills,
They're taken from playgrounds and schools,
In tender years made to go the pace that kills,
In the sweatshops, 'mong the looms and the spools.
Then we'll sing one song of the One Big Union Grand,
The hope of the toiler and slave,
It's coming fast; it is sweeping sea and land,
To the terror of the grafter and the knave.

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THE REBEL GIRL

Words and Music by Joe Hill

(Copyrighted, 1916)

There are women of many descriptions
In this queer world, as everyone knows,
Some are living in beautiful mansions,
And are wearing the finest of clothes.
There are blue blooded queens and princesses,

Who have charms made of diamonds and pearl;
But the only and thoroughbred lady
Is the Rebel Girl.

CHORUS

That's the Rebel Girl, that's the Rebel Girl!
To the working class she's a precious pearl.
She brings courage, pride and joy
To the fighting Rebel Boy.
We've had girls before, but we need some more
In the Industrial Workers of the World.
For it's great to fight for freedom
With a Rebel Girl.

Yes, her hands may be hardened from labor,
And her dress may not be very fine;
But a heart in her bosom is beating
That is true to her class and her kind.
And the grafters in terror are trembling
When her spite and defiance she'll hurl;
For the only and thoroughbred lady
Is the Rebel Girl.

WE'RE READY

(Air: "Soldier's Song")

Courage and honor to him who's jailed;
Our hearts shall cheer him and cry "All Hail!"
Our hands shall help to win the fight—
We're ready to fight, we're ready to die
For Liberty.

Words and Music of "The Rebel Girl" may be obtained in popular sheet form by applying to I. W. W. Publishing Bureau. Price 25 cents.

WAGE WORKERS, COME JOIN THE UNION.

(Tune: "Battle Hymn of the Republic")

We have seen the reaper toiling in the heat of summer sun,
We have seen his children needy when the harvesting was done,
We have seen a mighty army dying, helpless, one by one,
While their flag went marching on.

CHORUS.

Wage workers, come join the union!
Wage workers, come join the union!
Wage workers, come join the union!
Industrial Workers of the World.

O, the army of the wretched, how they swarm the city street—
We have seen them in the midnight, where the Goths and Vandals meet;
We have shuddered in the darkness at the noises of their feet,
But their cause went marching on.

Our slavers' marts are empty, human flesh no more is sold,
Where the dealer's fatal hammer wakes the clink of leaping gold,
But the slavers of the present more relentless powers hold,
Though the world goes marching on.

But no longer shall the children bend above the whizzing wheel,
We will free the weary women from their bondage under steel;
In the mines and in the forest worn and helpless man shall feel
That his cause is marching on.
Then lift your eyes, ye toilers, in the desert hot and drear,
Catch the cool winds from the mountains. Hark! the river's voice is near;
Soon we'll rest beside the fountain and the dreamland will be here.
As we go marching on.

36 **[116]**.

THE PARASITES

By John E. Nordquist

(Tune: "Annie Laurie")

Parasites in this fair country, lice from honest labor's sweat;
There are some who never labor, yet labor's product get;
They never starve or freeze, nor face the wintry breeze;
They are well fed, clothed and sheltered,
And they do whate'er they please.

These parasites are living, in luxury and state;
While millions starve and shiver, and moan their wretched fate;

They know not why they die, nor do they ever try
Their lot in life to better;
They only mourn and sigh.

These parasites would vanish and leave this grand old world,
If the workers fought together, and the scarlet flag unfurled;
When in One Union grand, the working class shall stand,
The parasites will vanish,
And the workers rule the land.

UP FROM YOUR KNEES!

By Ralph H. Chaplin

(Air: "Song of a Thousand Years")

Up from your knees, ye cringing serfmen!
What have ye gained by whines and tears?
Rise! they can never break our spirits
Though they should try a thousand years.

CHORUS

A thousand years, then speed the victory!
Nothing can stop us nor dismay.
After the winter comes the springtime;
After the darkness comes the day.
Break ye your chains; strike off your fetters;
Beat them to swords—the foe appears—
Slaves of the world, arise and crush him;
Crush him or serve a thousand years.

Join in the fight—the Final Battle,
Welcome the fray with ringing cheers,
These are the times all freemen dreamed of—
Fought to attain a thousand years.

Be ye prepared; be not unworthy,—
Greater the task when triumph nears.
Master the earth, O Men of Labor,—
Long have ye learned—a thousand years.

Over the hills the sun is rising,
Out of the gloom the light appears.
See! at your feet the world is waiting,—
Bought with your blood a thousand years.

DUMP THE BOSSES OFF YOUR BACK

By John Brill

(Tune: "Take It to the Lord in Prayer")

Are you poor, forlorn and hungry?
Are there lots of things you lack?
Is your life made up of misery?
Then dump the bosses off your back.
Are your clothes all patched and tattered?
Are you living in a shack?
Would you have your troubles scattered?
Then dump the bosses off your back.

Are you almost split asunder?
Loaded like a long-eared jack?
Boob—why don't you buck like thunder?
And dump the bosses off your back.
All the agonies you suffer,

You can end with one good whack—
Stiffen up, you orn'ry duffer——
And dump the bosses off your back.

The I. W. W. hits the boss in the latitude of his hip where he carries his greenware.

38 **[117]**

HARK! THE BATTLE-CRY IS RINGING!

By H. S. Salt

(Air: "March of the Men of Harlech")

Hark! the battle-cry is ringing!
Hope within our bosoms springing,
Bids us journey forward, singing—
Death to tyrants' might!
Tho' we wield not spear nor sabre,
We the sturdy sons of Labor,
Helping every man his neighbor,
Shirk not from the fight!
See our homes before us;
Wives and babes implore us;
So firm we stand in heart and hand,
And swell the dauntless chorus:

CHORUS

Men of Labor, young or hoary,
Would you win a name in story?
Strike for home, for life, for glory!
Justice, Freedom, Right!

Long in wrath and desperation,
Long in hunger, shame, privation,
Have we borne the degradation
Of the rich man's spite;
Now, disdaining useless sorrow,
Hope from brighter thoughts we'll borrow;
Often shines the fairest morrow
After stormiest night.
Tyrant hearts, take warning,
Nobler days are dawning;
Heroic deeds, sublimer creeds,
Shall herald Freedom's morning!

39

EVERYBODY'S JOINING IT

By Joe Hill.

(Air: "Everybody's Doin' It")

Fellow workers, can't you hear,
There is something in the air,
Everywhere you walk, everybody talk
'Bout the I. W. W.
They have got a way to strike
That the master doesn't like—
Everybody stick, that's the only trick,
All are joining it now.

CHORUS

Everybody's joining it! Joining what? Joining it!
Everybody's joining it! Joining what? Joining it!
One Big Union; that's the workers' choice,
One Big Union; that's the only noise,
One Big Union; shout with all your voice;
Make a noise, make a noise, make a noise, boys,
Everybody's joining it! Joining what? Joining it!
Everybody's joining it! Joining what? Joining it!
Joining in this union grand,
Boys and girls in every land;
All the workers hand in hand—
Everybody's joining it now.

Th' Boss is feeling mighty blue,
He don't know just what to do,
We have got his goat, got him by the throat,
Soon he'll work or go starving.
Join I. W. W.
Don't let bosses trouble you,
Come and join with us—everybody does—
You've got nothing to lose.

Will the One Big Union grow?
Mister Bonehead wants to know,
Well! What do you think of that funny gink
Asking such foolish questions?
Will it grow? Well! Look a here,
Brand new unions everywhere,
Better take a hunch, join the fighting bunch,
Fight for Freedom and Right.

A. F. OF L. SYMPATHY.

By B. L. Weber

(Tune: "All I Got Was Sympathy")

Bill Brown was a worker in a great big shop,
Where there worked two thousand others;
They all belonged to the A. F. of L.,
And they called each other "brothers."
One day Bill Brown's union went out on strike,
And they went out for higher pay;
All the other crafts remained on the job,
And Bill Brown did sadly say:

CHORUS

All we got was sympathy;
So we were bound to lose, you see;
All the others had craft autonomy,
Or else they would have struck with glee,
But I got good and hungry,
And no craft unions go for me.
Gee! Ain't it hell, in the A. F. of L.
All you get is sympathy.

Bill Brown was a thinker, and he was not a fool,
And fools there are many, we know,
So he decided the A. F. of L.
And its craft divisions must go.
Industrial Unions are just the thing,
Where the workers can all join the fight;
So now on the soap box boldly he stands,
A singing with all of his might:

CHORUS

There are but two nations, a nation of Masters and a nation of Slaves.

One active agitating worker in the industry, is worth a dozen in the jungle.

One Big Union, One Enemy—The Boss.

41

JOHN GOLDEN AND THE LAWRENCE STRIKE

By Joe Hill

(Tune: "A Little Talk With Jesus")

In Lawrence, when the starving masses struck for more to eat
And wooden-headed Wood he tried the strikers to defeat,
To Sammy Gompers wrote and asked him what he thought,
And this is just the answer that the mailman brought:

CHORUS

A little talk with Golden
Makes it right, all right;
He'll settle any strike,
If there's coin in sight;
Just take him up to dine
And everything is fine—
A little talk with Golden
Makes it right, all right.

The preachers, cops and money-kings were working
hand in hand,
The boys in blue, with stars and stripes were sent
by Uncle Sam;
Still things were looking blue, 'cause every striker
knew
That weaving cloth with bayonets is hard to do.
John Golden had with Mr. Wood a private interview,
He told him how to bust up the "I double double U."
He came out in a while and wore the Golden smile.
He said: "I've got all labor leaders skinned a
mile."
John Golden pulled a bogus strike with all his "pinks
and stools."
He thought the rest would follow like a bunch of
crazy fools.
But to his great surprise the "foreigners" were
wise,
In one big solid union they were organized.

CHORUS OF LAST VERSE

That's one time Golden did not
Make it right, all right;
In spite of all his schemes
The strikers won the fight.
When all the workers stand
United hand in hand,
The world with all its wealth
Will be at their command.

WORKERS OF THE WORLD, UNITE

By Walquist

(Tune: "Love Me and the World Is Mine")

I wander up and down the street,
Till I have blisters on my feet.
My belly's empty, I've no bed,
No place to rest my weary head.
There's millions like me wandering,
Who are deeply pondering,
Oh, what must we do to live?
Shall the workers face starvation, mis'ry and privation,
In a land so rich and fair?

CHORUS

Unite, my Fellow Men, unite!
Take back your freedom and your right
You have nothing to lose now,
Workers of the World, unite.

Oh! workingmen, come organize,
Oh! when, oh! when will you get wise?
Are you still going to be a fool,
And let the rich man o'er you rule?
It is time that you were waking,
See the dawn is breaking,
Come now, wake up from your dream.
All this wealth belong to toilers,
And not to the spoilers,
Wage slaves throw your chains away.

CHORUS

Unite, my Fellow Men, unite!
And crush the greedy tyrant's might.
The earth belongs to Labor,
Workers of the World, unite.

DON'T FORGET that you have been up against it this winter. How about next winter?

43

LABOR'S DIXIE

By Charles M. Robinson

Work away down South in the land of cotton,
"Citizen's Leagues" and all that's rotten,
Work away, day by day, nary pay, Dixie land;
Work away down South in Dixie,
Work away, nary pay,
In Dixie land the children toil
And the mothers moil in Dixie land,
Work away, day by day, nary pay down South in Dixie.

CHORUS

Work away, work away, away, away,
Away down South in Dixie!
In Dixie land let's take our stand
And live and die for Dixie!

In Dixie land is the Democratic party,
Organized to make the darkie
Work away, day by day, nary pay, Dixie land;
Work away down South in Dixie,

Work away, nary pay,
In Dixie land it grinds and grabs
And burns and stabs in Dixie land,
Work away, day by day, nary pay down South in Dixie.

In Dixie land is the thief land-holder—
Used to be bold, but he's now grown bolder,
Work away, day by day, nary pay, Dixie land;
Work away down South in Dixie,
Work away, nary pay,
In Dixie land he drags white "tramps"
Off to his camps in Dixie land,
Work away, day by day, nary pay down South in Dixie.

But in Dixie land we're organizing,
Soon results will be surprising,
Work away, day by day, it will pay, Dixie land;
Work away, day by day, it will pay down South in Dixie.
Work away down south in Dixie,
Work away, it will pay,
For in Dixie land we'll strike the blow—
The boss must go from Dixie land—

44 [120]

THE WORKERS OF THE WORLD ARE NOW AWAKING

By Richard Brazier

(Tune: "The Shade of the Old Apple Tree")

The Workers of the World are now awaking;
The earth is shakin' with their mighty tread,

The master class in great fear now are quaking,
The sword of Damocles hangs o'er their head.
The toilers in one union are uniting,
To overthrow their cruel master's reign.
In one union now they all are fighting,
The product of their labor to retain.

CHORUS

It's a union for true Liberty,
It's a union for you and for me;
It's the workers' own choice,
It's for girls and for boys,
Who want freedom from wage slavery;
And we march with a Red Flag ahead,
'Cause the blood of all nations is red—
Come and join in the fray,
Come and join us today,
We are fighting for Freedom and Bread.

The master class in fear have kept us shaking,
For long in bondage they held us fast;
But the fight the Industrial Workers are now making
Will make our chains a relic of the past.
Industrial unionism now is calling,
The toilers of the world they hear it cry.
In line with the Industrial Workers they are falling,
By their principles to stand or fall and die.

DON'T FORGET that eight hours a day would put thousands to work.

Why does a short work day and a long pay always go together?

PAINT 'ER RED

By Ralph H. Chaplin

(Tune: "Marching Through Georgia")

Come with us, you workingmen, and join the rebel band;
Come, you discontented ones, and give a helping hand.
We march against the parasite to drive him from the land.
With ONE BIG INDUSTRIAL UNION!

CHORUS

Hurrah! hurrah! we're going to paint 'er red!
Hurrah! hurrah! the way is clear ahead—
We're gaining shop democracy and liberty and bread
With ONE BIG INDUSTRIAL UNION!

In factory and field and mine we gather in our might,
We're on the job and know the way to win the hardest fight,
For the beacon that shall guide us out of darkness into light,
Is ONE BIG INDUSTRIAL UNION!

Come on, you fellows, get in line; we'll fill the boss with fears;
Red's the color of our flag, it's stained with blood and tears—
We'll flout it in his ugly mug and ring our loudest cheers
For ONE BIG INDUSTRIAL UNION!

"Slaves" they call us "working plugs," inferior by birth,

But when we hit their pocketbooks we'll spoil their
smiles of mirth—
We'll stop their dirty dividends and drive them from
the earth
With ONE BIG INDUSTRIAL UNION!

We hate their rotten system more than any mortals
do.
Our aim is not to patch it up, but build it all anew.
And what we'll have for government, when finally
we're through.
Is ONE BIG INDUSTRIAL UNION!

46 [121]

GONE ARE THE DAYS

By Richard Brazier

(Tune: "Old Black Joe")

Gone are the days, when the master class could say,
"We'll work you long hours for little pay;
We'll work you all day and half the night as well."
But I hear the workers' voices saying, "You will, like
Hell."

CHORUS

For we're going, we're going to take an eight hour
day.
We surely will surprise the Boss some first of May.

Now, workmen, it's up to you to say
If you want a general eight hour day.
As soon as you are ready, we are with you heart and
hand.
All you have to do is to join our Union grand.

CHORUS

Now, workingmen, we are working far too long;
That's why we've got this vast unemployed throng.
Give every worker a chance to work each day;
Let's all join together and to the Boss all say,

CHORUS

SABOTAGE

Make it too expensive for the boss to take the lives and liberty of the workers. Stop the endless court trials by using the Wooden Shoe on the job.

Secure a bundle order of Solidarity each week for distribution, one and one-half cents per copy.

"War is Hell." Let the capitalists go to war to protect their own property.

47

THE WORKERS' BATTLE CRY FOR FREEDOM

By Geo. G. Allen

(Air: "Shouting the Battle Cry of Freedom")

Yes, we'll rally from the mines, boys, and fields of waving grain,
To shout the Workers' battle cry for freedom.
And we'll rally from the workshops where millions have been slain,
To shout the Workers' battle cry for freedom.

CHORUS

One Union forever, Hurrah, boys, Hurrah!
Down with Tradition! Let's raise the Wooden Claw.
Then we'll rally from the sweat shops, from brush to Poor Man's Lane,
To shout the Workers' battle cry for freedom.

We shall rally to the call, boys, on every sea and shore.
To shout the Workers' battle cry for freedom.
We shall stand with folded arms and for Masters slave no more,
And shout the Workers' battle cry for freedom.

CHORUS

When the world is standing still and the Master cries for peace,
Let's shout the Workers' battle cry for freedom.
When he dons the overalls then the working class will cease
To shout the Workers' battle cry for freedom.

SECOND CHORUS

One Union forever! Hurrah, boys, Hurrah!
Down with the Gunmen! Let's raise the Wooden Paw.
When we've gathered in the Camp, in the Jungle, on the Train,
Let's shout the Workers' battle cry for freedom.

COME JOIN THE ONE BIG UNION, DO

(Tune: "My Hula Hula Love")

By Richard Brazier

Down in Lawrence, Massachusetts, where we held the Woolen Trust at bay
And won a shorter day, and a big increase in pay;
Where the workers showed the shirkers just what they could do.
In Little Falls, too, they won the day.

CHORUS

Workers, oh workers, let's show this gang of shirkers
What we can do with One Union true.
For your Union is fighting, for you your wrongs we're righting;
Come join the One Big Union, do.

Down in Louisiana, where the fighting lumberjacks do dwell,
Their labor power sell, in Kirby's peon hell;
Where the masters met disaster, when they met these workingmen who knew
That One Big Union true, could win the fray.
The women in the sweatshops, and the children working in the mills;
The stockyard's man who kills, the miner in the hills;
Must stick together, in all weather; in One Big Union they must fight
Against the master's might, they must unite.

DON'T FORGET that our fight is your fight. So let's fight together.

Organize yourself and fellow workers on the job for higher wages, shorter hours and better conditions.

DON'T FORGET that a short work day, and big pay, always go together.

49

WALKING ON THE GRASS

(Tune: "The Wearing of the Green")

In this blessed land of freedom where King Mammon wears the crown,
There are many ways illegal now to hold the people down.
When the dudes of state militia are slow to come to time,
The law upholding Pinkertons are gathered from the slime.

There are wisely framed injunctions that you must not leave your job,
And a peaceable assemblage is declared to be a mob,
And Congress passed a measure framed by some consummate ass,
So they are clubbing men and women just for walking on the grass.

In this year of slow starvation, when a fellow looks for work,
The chances are a cop will grab his collar with a jerk;
He will run him in for vagrancy, he is branded as a tramp,
And all the well-to-do will shout: "It serves him right, the scamp!"

So we let the ruling class maintain the dignity of law,
When the court decides against us we are filled with wholesome awe,
But we cannot stand the outrage without a little sauce
When they're clubbing men and women just for walking on the grass.
The papers said the union men were all but anarchist,
So the job trust promised work for all who wouldn't enlist;
But the next day when the hungry horde surrounded city hall,
He hedged and said he didn't promise anything at all.
So the powers that be are acting very queer to say the least—
They should go and read their Bible and all about Belshazzar's feast,
And when mene tekel at length shall come to pass,
They'll stop clubbing men and women just for walking on the grass.

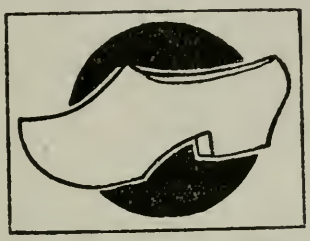
50 [123]

LIBERTY FOREVER

(Air: "Anvil Chorus")

We broke the yoke of a pitiless class,
And we burst all asunder our bonds and chains;
Our organization will win when it strikes,
And no more shall a king or a crown remain—
United fast we are with bonds that naught can sever;

Long, loud and clear and far our battle cry rings
ever—
Liberty for aye and aye!
Liberty for ever!
Liberty for ever!
Shall be our battle cry.



If freedom's road seems rough and hard,
And strewn with rocks and thorns,
Then put your wooden shoes on, pard,
And you won't hurt your corns,
To organize and teach, no doubt,
Is very good—that's true,
But still we can't succeed without
The good old wooden shoe.

J. Hill.

UNION SCABS

My dear brother, I am sorry to be under contract to hang you, but I know it will please you to hear that the scaffold is built by union carpenters, the rope bears the label and here is my card.

THE BONEHEAD WORKING MAN

Mr. Slave, Mr. Slave, listen to the call,
Of the brave to the brave; take the world for all.
Now you need the light and might to free all homeless working men,
Look around, all around and see,
Hear the pound, hear the sound of machinery.
How the owners fool you, how they rule you.
Just hear the bosses blow.

CHORUS.

Hurry up! Hurry up! on my new machine.
Man, you're slow, boss is losing money.
It displaces seventy men. If you cannot speed up you're fired then.
Go and look, go and look for another master.
Good or bad, you sure will make him wealthy.
It's God darned hard to wake you up.
YOU'RE A BONEHEAD WORKING MAN.

Mr. Slave, Mr. Slave, hear the union grand.
It's a wave, it's a wave rolling through the land.
This the masters fear we are here to free our class from slavery.
Get a book, get a book, read the word of light.
Take a look, take a look, join the band of might.
Come and be a wobbly, then you'll probably
Not let the bosses cry:

CHORUS

I. W. W. PENNANTS

Full size red felt pennants with large I. W. W. label and the wording, One Big Union. With the design and wording in three colors this makes an attractive appearance for demonstrations, and for decorating halls, etc. Price 25 cents each, postpaid.

52 [124]

WHERE THE FRASER RIVER FLOWS.

(Tune: "Where the River Shannon Flows")

Fellow workers pay attention to what I'm going to mention,
For it is the fixed intention of the Workers of the World.
And I hope you'll all be ready, true-hearted, brave and steady,
To gather 'round our standard when the Red Flag is unfurled.

CHORUS

Where the Fraser river flows, each fellow worker knows,
They have bullied and oppressed us, but still our Union grows.
And we're going to find a way, boys, for shorter hours and better pay, boys;
And we're going to win the day, boys; where the river Fraser flows.

For these gunny-sack contractors have all been dirty actors,

And they're not our benefactors, each fellow worker knows.
So we've got to stick together in fine or dirty weather,
And we will show no white feather, where the Fraser river flows.

Now the boss the law is stretching, bulls and pimps he's fetching,
And they are a fine collection, as Jesus only knows.
But why their mothers reared them, and why the devil spared them,
Are questions we can't answer, where the Fraser river flows.

Why should any worker be without the necessities of life when ten men can produce enough for a hundred?

53

ONE BIG INDUSTRIAL UNION.

By G. G. Allen

(Air: "Marching Through Georgia")

Bring the good old red book, boys, we'll sing another song,
Sing it to the wage slave who has not yet joined the throng
Of the revolution that will sweep the world along,
To One Big Industrial Union.

CHORUS

Hooray! Hooray! The truth will make you free.
Hooray! Hooray! When will you workers see?

The only way you'll gain your economic liberty,
Is One Big Industrial Union.

How the masters holler when they hear the dreadful sound
Of sabotage and direct action spread the world around;
They's getting ready to vamoose with ears close to the ground,
From One Big Industrial Union.

Now the harvest String Trust they would move to Germany,
The Silk Bosses of Paterson, they also want to flee
From strikes and labor troubles, but they cannot get away
From One Big Industrial Union.

You migratory workers of the common labor clan,
We sing to you to join and be a fighting Union Man;
You must emancipate yourself, you proletarian,
With One Big Industrial Union.

CHORUS

Hooray! Hooray! Let's set the wage slave free,
Hooray! Hooray! With every victory
We'll hum the workers' anthem till you finally must be
In One Big Industrial Union.

NOVEMBER NINETEENTH.

By John E. Nordquist

(Tune: "The Red Flag")

They've shot Joe Hill, his life has fled,
They've filled his manly heart with lead;
But his brave spirit hovers near
And bids each fellow worker cheer.

CHORUS

On high the blood red banners wave!
The flag for which his life he gave;
The master class shall rue the day
They took Joe Hillstrom's life away.

Now, fellow workers, shed no tear,
For brave Joe Hill died without fear;
He told the bosses' gunmen, low:
"I'm ready fire! Let her go!"

No more Joe Hill shall pen the songs
That pictured all the workers' wrongs;
His mighty pen shall rust away,
But all his songs are here to stay.

Now Salt Lake City's Mormon throngs
Must list to Joe Hill's rebel songs;
While angry sabs shall prowl the night
To Show the One Big Union's might.

March on, march on, you mighty host,
And organize from coast to coast;
And Joe Hill's spirit soon shall see
Triumphant Labor's victory.

"Military preparedness" is a part of the "preparedness of the capitalist class" for larger and more intensive exploitation of labor. One Big Union of the working class will be sufficient "preparedness" to enable the working class to overcome their enemy —ON ANY FIELD.

55

JOE HILL'S LAST WILL.

(Written in his cell, November 18, 1915, on the eve of his execution)

My will is easy to decide,
For there is nothing to divide.
My kin don't need to fuss and moan —
"Moss does not cling to a rolling stone."

My body? Ah, if I could choose,
I would to ashes it reduce,
And let the merry breezes blow
My dust to where some flowers grow.

Perhaps some fading flower then
Would come to life and bloom again,
This is my last and final will,
Good luck to all of you.

JOE HILL.

"I have lived like an artist; I shall die like an artist."—Joe Hill.

"Don't waste any time mourning—ORGANIZE!" —Joe Hill.

WORDS AND MUSIC
in
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of
the following songs written by Joe Hill:
"The Rebel Girl."
"Don't Take My Papa Away from Me."
"Workers of the World, Awaken."
Single copies, 25c, 5 for $1.00, 60 for $10.00.
I. W. W. Publishing Bureau.
56 **[126]**

HOW TO JOIN THE I. W. W.

Any wage worker wishing to become a member of the Industrial Workers of the World, may proceed in the following manner:

1. If you live in a locality where there is a union of your industry already in existence, apply to the secretary of that union. He will furnish you with an application blank containing the Preamble to the I. W. W. Constitution and the two questions which each candidate must answer in the affirmative. The questions are as follows:

"Do you agree to abide by the constitution and regulations of this organization?"

"Will you diligently study its principles and make yourself acquainted with its purposes?"

The initiation fee is fixed by the union, but cannot be more than $5.00 in any instance, and is usually $2.00. The monthly dues cannot exceed $1.00 and are in most unions 50 cents.

2. If there is no union of the I. W. W. in your vi-

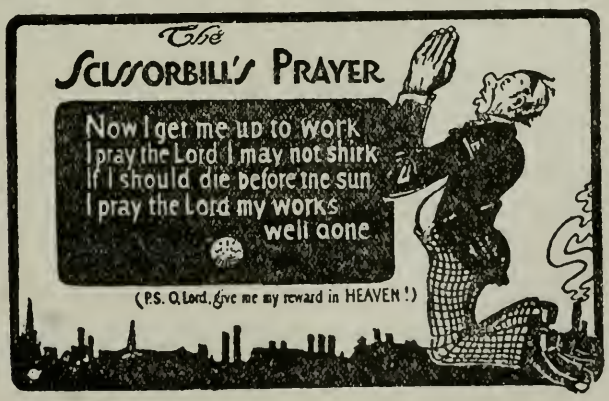
cinity, you may become a Member of the General Recruiting Union by making application to the General Secretary, whose address is given below. You will be required to answer affirmatively the two above questions, and pay an initiation fee of $2.00. The monthly dues are 50c for membership.

3. Better still, write to the General Secretary for a Charter Application Blank. Get no less than TWENTY signatures thereon, of bona fide wage workers in any one industry and send the charter application with the names to the General Secretary, with the $10.00 charter fee. Supplies, constitutions and instructions will then be sent you, and you can proceed to organize the union.

Join the I. W. W. Do it now!

The address of the General Secretary-Treasurer of the I. W. W. is, Wm. D. Haywood, 1001 W. Madison Street, Chicago, Ill.

STICK 'EM UP!



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I. W. W. PUBLISHING BUREAU
1001 W. Madison Street CHICAGO, ILL.

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Too great a number of titles of books, pamphlets, leaflets, etc., are now furnished by the Publishing Bureau to allow their listing here in limited space. In nearly every town there are either Local Organizations of the I. W. W. or Newsdealers who carry a complete stock of the literature on this subject.

An Introductory Package of literature the regular value of which is $1.00 is offered to those wishing to make a preliminary study of this subject and the I. W. W. at 75c postpaid. The package contains one each of eleven pamphlets and also a copy of the Song Book.

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Literature in foreign languages should be ordered from papers in respective language as listed here. [128]

[Second Cover]

(Cover of pamphlet:)

I. W. W.

One Big Union

Of All the Workers

The Greatest Thing on Earth

The I. W. W. Preamble.

The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people, and the few who make up the employing class have all the good things of life.

Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

We find that the centering of the management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever-growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping to defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

These conditions can be changed and the interests of the working class upheld only by an organization formed in such a way that all its members in any one industry, or in all industries if necessary, cease

work whenever a strike or lockout is on in any department thereof, thus making an injury to one [129] an injury to all.

Instead of the conservative motto: "A fair day's wages for a fair day's work," we must inscribe on our banner the revolutionary watchword: "Abolition of the wage system."

It is the historic mission of the working class to do away with Capitalism. The army of production must be organized, not only for the every-day struggle with capitalism, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old.

ONE BIG UNION.

Social relations are the reflex of the grouping of industrial possessions. The owners of all resources and means of wealth form a class of their own; the owners of labor power as their only possession in the market, another. Political, judicial, educational and other institutions are only the mirror of the prevailing system of ownership in the resources and means of production.

One class owns and controls the necessaries, to wit: the economic resources of the world. That class, for its own protection and perpetuation in power, subjects all other institutions to their prevailing class interests. Conversely, there is a class that strives to change the foundation of the industrial arrangement. The workers realize that immediately following the change these social relations will also be shifted; institutions deriving their sup-

port and sustenance from the class in power will be made to conform to new conditions after the overthrow of the previously existing industrial system. [130]

Social structures collapse as a result of ever recurring changes in their economic foundation. But the new structure is not a ready-made product of each of the epochs of reconstruction. An historic process of evolution reaches a climax in a revolutionary upheaval. Achievements of preceding epochs are always utilized in the constructive work of a never-resting, always advancing civilization.

Decaying elements render nourishment to Mother Earth for the generation of new species and structures. Nothing is lost in the reciprocal process of nature. Precisely so in social systems. Achievements of social and industrial evolutions are always preserved after a revolutionary climax removes all obstacles to further developments. Only the class previously dominating the policies and actions of the social institutions is supplanted by the revolutionary change; one form of ownership in the means of life is shifted to another class.

Capitalist ownership of industries had its origin in the unfolding of conditions which hastened the downfall of the feudal age, and the advent of another class to power.

Co-operative control of industries by all engaged in the process of production must build its foundation on the highly perfected form and methods of production, and upon the conditions which accelerate the passing away of the capitalist system of

ownership in the instruments of production and distribution.

The feudal lords had to surrender their sceptre to the ascending bourgeoisie, better known to-day as the capitalist class. The latter, at the outset, had in view only the free development of all forces of production, in an era of unrestricted competition between individuals. When, over a century ago, the change was consummated by revolutions, the instruments [131] of production were more equally distributed. They were in possession of a multitude of the victorious capitalists, who owned small enterprises. Most people would expect that in such a competitive system as was then established, every one would have a chance to rise to a superior station in life. The instruments of production were not highly developed. Handicraft in the operation of small machines, or in the use of tools, still predominated. Small capital only was required in starting the manufacture of things for small margins of profits.

This epoch, beginning with the revolution of the "Third Estate" in France, found its counterpart in the revolution of the American people against British semi-feudalistic rule. Since then the forms, methods and yield of production have rapidly developed in one direction, in every industrially advanced country. The means of production were centralized ever more in fewer and fewer hands. With the centralization of the means of production and distribution, the agencies protecting the interests in power also grew proportionately. Gradually all elements

that obscured the lines of cleavage between the producers of wealth and the class that expropriated all economic resources of the world are eliminated.

The manufacturers of yore exist only in small communities. They depend, however, more or less on the good will of those who permit them to exist by supplying them with the raw products for production, or those who own the transportation facilities by which the products are transported into the markets.

In this process of transformation other things can be observed. Social relations are shifting with the change in the forms and in the ownership of the means of production. Social strata are fiercely struggling for their conservation, [132] in vain. There is no escape from the irretrievable result of these rapid changes in industrial possessions and arrangements.

The howls of freaks, the frantic appeals and clamors of reformers will not in the least affect the course of events. The destructive battles of trades unions, divided up in factions and sections that find their traditional base in the middle ages, will not turn back the wheel that rolls on with irresistible force.

The outcry, so often heard before, redounds in vociferous strength again: A revolution! "A revolution is needed to change these conditions." It is a cry of despondency. Not only heard from Socialists. They at least propose some way of consummating their program of a revolution. But the middle-class is more frantic in its wailings of despair. In their band wagon they are lining up a large following of workers. Millions are made to

believe that an impending struggle against predatory wealth will have as object the restoration of bygone conditions or the enforcement of restrictive measures for curbing further concentration of industries.

But the workers are not, and should not be concerned in the hopeless struggles of a decaying element of society. They have an historic mission to perform, a mission that they will carry out despite the promises held out to them that a restoration of past conditions would accrue to their benefit also.

They begin to realize that in the constructive work for the future they have to learn the facts of past evolutions and revolutions. And from these facts expressed in theories they find the guide for the course that they have to pursue in their struggle for the possessions of the earth, and the goods [133] that they alone have created. That growing portion of the working class are building on the rockbed of historic facts and the structure to be erected follows the plan that

"It is the historic mission of the working class to do away with capitalism"—"the army of production must be organized. By organizing industrially the workers are forming the structure of the new society within the shell of the old."

Some definite conclusion must be drawn from the previously established premises. It is the heritage of the working class to utilize to the fullest extent the great achievements of the preceding and existing processes and methods of production, for the benefit of all useful members of society.

In its advent to power and supremacy the present economic master class succeeded another that decayed in the process of evolution. This mastery of the present owners of the economic resources will also give way and pave the way for successors. The workers, conscious of their mission, must recognize the fact that the industries are developing to the highest state of perfection, and will be ready for operation under a new arrangement of things, namely after the class now in possession and control of them have gone the way of decay under the pressure of the advancing force of a new civilization. But it is imperative to arrange the human forces of production for the operation of the vast resources and implements of production under a system wherein commodities will be made for use alone. To build and to arrange correctly, and for lasting purposes, the constructors of a further developed industrial structure must possess a thorough knowledge of the material, and of organizations destined to accomplish the task. The architects must know the proper grouping of each component part and cell in the composition [134] of industrial combinations, so that, when harmony in the industrial relationship of mankind is established, it will be reflected in the harmonious social, political, judicial, and ethical institutions of a new age.

We repeat: Industrial and social systems are not ready-made products. In their changes from one stage to another they derive their propelling forces from the achievements and accomplishments of each

preceding epoch. In its onward course to a further advanced system, society is going to utilize all that present day society has evolved and constructed. This the workers must know, and then they will also learn the intricate, interdependent arrangements of the component parts of the whole industrial system. Equipped with this knowledge, they will be able to construct and form their own industrial organizations, the frame-structure of the new society, accordingly. By learning the social relations and understanding their source, they can profit and prepare to change the industrial structure of society, which as a matter of course, will determine also the changes in the social and political character of the system which is bound to be inaugurated. And this is the problem. The working class, as the promoter and supporter of a higher standard of social relations and interrelations, must be equipped with the knowledge, must construct the organizations, by which the cause of social classes can be removed. Industrial inequality is the source of all other inequality in human society. The change in the ownership of the essentials of life will bring automatically, so to say, the change in the intercourse and the associations, and also in the institutions for the promotion of these things, between the human beings upon the globe.

Good will, revolutionary will-power, determination, [135] courage are valuable assets in the struggle for the change. But they are like the water on the millwheels, unconscious of the great service that they are rendering. To convert force and power into useful operation requires intelligence. And

that intelligence must guide us to use the accumulated force for a defined purpose. That purpose, as it seems to be agreed, is to form a new social, or rather industrial structure within the shell of the old. To accomplish this the advocates, the militants for the new, must know to what extent the present factors in industrial development have organized and systematized industrial production. When this is fully understood, this may also explain the subsequent domination of industrial possession over the political, social and other agencies in present day and previously existing societies.

The workers of the world, conscious of their historic mission, will learn to avoid the mistakes they would make should they depend on other forces than their own for the solution of the world's problem. Agencies and institutions deriving their lease of existence from the industrial masters of today can not be looked to for support. They may feign being in favor of radical changes in the effects—they will, however, strenuously and violently oppose any attempt at destroying the base, or the cause.

The working class alone is interested in the removal of industrial inequality, and that can only be accomplished by a revolution of the industrial system. The workers, in their collectivity, must take over and operate all the essential industrial institutions, the means of production and distribution, for the well-being of all the human elements comprising the international nation of wealth-producers. [136]

No destruction, no waste, no return into barbar-

ism! A higher plan of civilization is to be achieved. When the workers understand how the industrial system of today has developed, how one industrial pursuit dovetails into another, and all comprise an inseparable whole, they will not wantonly destroy what generations of industrial and social forces have brought forth. The workers will utilize the knowledge of ages to build and to plant on a solid rockbed the foundation of a new industrial and social system.

The foundation must be firm and solid. The revolutionary climax, after an incessant course of evolutionary processes by which forms and methods undergo changes, will eliminate forever the cause for the industrial division of society into two hostile camps. Harmonious relations of mankind in all their material affairs will evolve out of the change in the control and ownership in industrial resources of the world.

That accomplished, the men and women, all members of society in equal enjoyment of all the good things and comforts of life, will be the arbiters of their own destinies in a free society.

We present, with this introduction, to all our comrades in battle and strife, a portrait of industrial combinations.

ANALYSIS OF THE ARRANGEMENT OF INDUSTRIES.

The Chart Explained in Detail.

The main object of this explanation to the chart is to show how industries are grouped together in a scientific order.

Production begins with the exploitation of the natural resources of the earth. Labor is applied to extract the material [137] that nature has stored up or generated. Production continues with the transportation of these products, mostly raw material, or fuel-matter, to the centers of manufacture and commerce. The construction of places of shelter for a man and things, the building of agencies of communication, are functions of another industrial branch of the system. We observe, finally, how the care-taking, the education, the providing for public convenience, fall to the functions of another department in the interdependent processes of industrial life.

In presenting this plan of organization of industries, as it exists today, we have in mind only the object before explained. The workers, forced by capitalistic ownership of the means and production to do service in all these industries, must organize themselves in their proper places in the industries in which they are engaged. Every worker who studies this map will find where he will fit in when the industries are organized for the control of the workers through industrial organization.

Of course, it is the ultimate purpose of this arrangement that every worker shall have equal rights, and equal duties also, with all others in the management of the industry in which he or she serves in the process of production.

But the other purpose, equally important, is to organize the workers in such a way that all the members of the organization in any one industry, or in

all industries if necessary, cease work whenever a strike or lockout is on in any department thereof, thus making the injury to one the injury to all.

Of course, this can only be accomplished when the workers organize on industrial lines. That is to say, the workers [138] of any one plant or industry must be members of one and the same organization—no craft division lines. The capitalist institutions are today organized on exactly the same lines. The industries as they are grouped to day, dovetailing into each other, furnish to the workers the basis for the construction of their organization for the struggles of today for better living conditions, and for the supervision and the management of industries in an industrial commonwealth of workers and producers.

DISTRIBUTION OF PRODUCTS IS PART OF PRODUCTION.

All natural resources of the soil, mines and water receive their first value when labor is applied to turn the products into useful things.

But all of these products have more social value when they are transported to places of manufacture and commerce, where they are transformed and converted into commodities for exchange.

The life of human beings will not consist of common drudgery alone when all the good things created are enjoyed by the workers.

For all purposes, present and the future, the functions of the public service institutions have to be defined, and people engaged in their maintenance must be given a place in the industrial organization; the

same as those who take care of the sick and disabled. Those who render other social and public service should know they are engaged in useful occupation, although most of the institutions in which they serve today are prostituted for the protection of capitalist interests.

For all functions combined, the industries are arranged on the general plan presented on the map, as follows: [139]

1. The Department of Agriculture, Land, Fisheries and Water Products.
2. The Department of Mining.
3. The Department of Transportation and Communication.
4. The Department of Manufacture and General Production.
5. The Department of Construction.
6. The Department of Public Service.

The departments again have their subdivisions. As it is proposed that the workers organize in accordance with the industries in which they are engaged in service, it is essential that a general term be applied. This will make it easier to understand that each of these industrial subdivisions constitutes for itself a sub-organization of workers, in which they will be able to govern affairs that appertain to that industry alone.

Each of these subdivisions would comprise the workers organized in an Industrial Union, which, however would not be separate and distinct from all others, as the term "division" would imply. (We

have looked in vain for an expression that would convey the proper meaning.)

It is impossible, at this stage, to eliminate entirely the terms now used to designate certain functions that sets of workers perform in each industry. But it should be distinctly understood that this is not to imply that these craft-groups in industries will organize, as has been the case heretofore, in separate craft-unions, or according to the tools that each set of workers use. That would mean dividing-up under another name. A worker in an industry will be assigned to the organization representing the product or products of that industry. Each sub-branch of the general industrial union is [140] modeled accordingly.

When the workers engaged in a particular industrial production organize industrially, all are subject to the same rules governing the affairs of each industry. But certain fundamental rules and principles governing all component parts of the "one big union of workers" cannot be infringed upon by any of its component parts without doing injury to the whole organic body.

Still another point to be made clear: The process of production does not cease until the finished product reaches the consumer. All workers engaged in the process of distribution are members of the same industrial union, or Department organization in which the makers of the commodity are organized.

Of course, the railroad and water-transportation workers will be in the Transportation Department, although it might be said that they also are engaged

in the process of distribution. But here is the difference. They only transport goods to other localities or countries, and the real distribution process for use and consumption takes place after finished commodities have reached the merchant.

For instance: A salesman or clerk in a shoe store would be a member of the organization, or a branch thereof, in which are organized all workers engaged in the shoe industry. A teamster delivering meats, or other goods from a grocery, would be in the organization in which all the foodstuff workers of that particular branch are organized. But a truck driver, who may haul a big shipment of boxes containing garments from one depot to another, and on his next trip between depots, will haul a load of nails for further transportation or distribution, performs the work of a transport worker, and as such organizers in the union of that industry. [141]

With these necessary explanations, suggestive of a better understanding of the plan of organization, one will far better be able to see how industries are grouped on the chart.

I.

DEPARTMENT OF AGRICULTURE, LAND, FISHERIES AND WATER PRODUCTS.

Four subdivisions comprise this department:

A. General and Stock Farming.

This subdivision comprises all workers employed in general and stock farming. 1. In grain and vegetables: All farm workers, in plowing, planting, reaping, and fertilizing operations—which would, of course, include all engineers, firemen, blacksmiths,

repairworkers, carpenters, etc., working on farms and engaged in farm-product work. All workers on cotton and sugar plantations would come into this group, also all irrigation-workers, that is, all working at the operation of irrigation-systems as engineers, pumpmen, lockmen, pipe and repairmen, etc. 2. On cattle and live stock farms: Ranchmen, herders, sheep shearers, general utility men, all workers on fowl and bird farms; on dairy farms, etc.

B. Horticulture.

This subdivision comprises all workers on fruit farms, flower gardens, tea and coffee plantations, orchards, tobacco farms—all workers engaged in the cultivation of silk, in vineyards, truck farms—workers in hothouses; fruit pickers, boxmakers and packers, etc.

C. Forestry and Lumbering.

In this subdivision are associated together all workers in forests; rangers, foresters, game wardens, woodchoppers, [142] and lumberworkers; all workers in the saw and shingle mills adjacent to forests, preparing wood for shipment for manufacturing purposes; collectors of sap, herb, leaf, cork and bark, etc.

D. Fisheries and Water Products.

In this subdivision are organized all fishermen on ocean, lakes and rivers; oyster and clam-bed keepers —in short, all workers engaged in raising, keeping and catching of fish; in the collection of pearls, sponges and corrals, such as divers, sorters, etc., which would include all mechanics on fishing boats and steamers, etc.

II.

DEPARTMENT OF MINING.

This department again consists of four large subdivisions:

A. Coal and Coke Mining.

All coal miners comprise this industrial union. All workers in bituminous, anthracite, lignite and other coal mines, including, of course, mining engineers, firemen, pumpmen, blacksmiths, mine carpenters, shotfirers, breaker boys. All workers employed in the production of coke, all miners of turf, peat; clerks in the offices of mines, and also all workers in the coal yards at the places of distribution, such as teamsters, shovelers, derrick-workers, weighers, etc.

B. Oil, Gas and By-Products.

The workers in this subdivision also organize to manage the affairs of this part of the mining industry, that is, all workers employed in the natural gas and oil fields; shaft sinkers, pipemen, pumpmen, tankmen, gaugers, and also all workers in the oil distribution places, as fillers, coopers, teamsters, all workers in the oil-refining plants, as well as [143] oil by-product institutions.

C. Metal Mining.

This subdivision embraces all workers employed in the mining of gold, silver, copper, zinc, lead, tin, platinum, iron, ore, etc., and in it are also organized all workers in the smelters, including the workers in the repair and mechanical departments, such as repairers, carpenters, machinists, ropemen, teamsters

in the main and subsidiary enterprises, and also waiters, cooks in small mining camps.

D. Salt, Sulphur, Mineral, Stone and Gem Mining.

In this fourth subdivision of the mining department organization are brought together all workers employed in the mining of *sale,* sulphur, clay, borax, mica, bromine, graphite, sodas, gypsum, asphalt, limestone, sandstone, whetstone, marble, onyx, slates, building stones, asbestos, and gems of all kinds, like diamonds, sapphires, etc.

It includes all workers in the refineries, in the salines, salt and soda dry works, quarry workers, etc.

III.

DEPARTMENT OF TRANSPORTATION AND COMMUNICATION.

Brief Preface.

The process of transportation, different from the process of final distribution, comprises the act of bringing the products of land, water, and mines to the places of manufacture and general production, and to re-transport the partly finished goods either to other places at which the process of production is finished, or to bring the finished goods to the points where the distribution to the users or consumers takes place. This process also includes the transport of human beings to and from one place to another. As the interchange process [144] cannot always be carried on by direct transportation of people, the indirect method of transmitting commercial transactions by mail or by telegraphy is resorted to.

All the workers engaged in either of the sub-branches of that department are organized together. But, for expediency, they are grouped together in five subdivisions, as parts of that department organization.

A. Long-Distance Transportation on Land.

This subdivision embraces all workers employed in the long distance railroad service, such as railroad engineers, motormen, firemen, conductors, trainmen, switchmen, all engaged in the supervision and maintenance of the roads, railroad freight yard workers, station tenders, watchmen, car repairers, railroad dispatchers and telegraphers; all workers in the railroad repair shops, all clerks in the railroad offices, etc., etc.

B. Marine Transportation.

In this subdivision are all workers employed on steamships, sailing vessels and tugboats, such as sailors and wheelsmen, engineers, water tenders, oilers, firemen and coalpassers, stewards, waiters, cooks, etc. Also all workers employed in the loading and unloading of vessels, dry dock and repair workers, etc., etc.

C. Municipal Transportation.

In this subdivision are organized all workers in municipal passenger transportation service, street car workers, all workers on elevated roads, or city subway lines, including all the workers in the power-producing plants, electricians, linemen, car shop workers, also cab drivers, automobile drivers, barn, stable and garage workers, wherever the service is

directly connected with the municipal transportation service. [144½]

D. Air Navigation.

This will comprise all workers engaged in the service of air navigation, transporting passengers, dispatches, or anything else.

E. Communication.

All workers in the postal and commercial telegraph, telephone and wireless service are organized in this subdivision, such as clerks, carriers, mail wagon teamsters, telegraph and telephone operators, towerman, linemen, including the janitors, cleaners, etc., in all stations and houses.

IV.

DEPARTMENT OF MANUFACTURE AND GENERAL PRODUCTION.

If this department be subdivided in industrial unions only, it would not give justice to those engaged in the various industrial sections that make up the complex organization embracing them all. The department comprises so many industries that it is necessary to establish a standard for their proper arrangement. Each kind of raw material transformed or converted into a finished article for use, be it either for food, or clothing, for comfort or general utility purposes, for the production of instruments for the further development of advanced producing methods, forms the basis for a subdepartment of production. Each sub-department again has its subdivisions. In other department organizations they are marked as parts of the same, while in this arrangement the subdivisions, or industrial unions,

form the component parts of a sub-department.

The Department of General Production is accordingly composed of the following sub-departments: [145]

a. Glass and pottery (ceramic goods).
b. Clothing and textile.
c. Leather and substitutes.
d. Metal working and machinery building.
e. Woodworking goods.
f. Chemicals.
g. Foodstuffs.
h. Printing.

Sub-Department A.

Glass and Pottery (Ceramic Goods).

1. All workers employed in the making of glass wares are organized in the first sub-division; flint glass, green glass, window glass, plate glass workers, furnace workers, mixers, blowers, gatherers, annealers, cutters, polishers, etc.

2. All workers in potteries, porcelain factories, china-ware factories, including decorators and designers, clerks, salesmen, teamsters in sales and distribution houses of ceramic goods.

3. Those employed in terra cotta works, tile and brick-making yards.

Sub-Department B.

Textile and Clothing Manufacture.

This sub-department is composed of workers from the following industrial subdivisions:

1. All workers employed in the manufacture of silk, linen, cotton, wool and worsted articles, as mule-spinners, loom-fixers, weavers, warpers, carders,

sorters, clerks and stenographers in factories and retail houses, all workers in dye-houses, including chemists, inspectors, also all workers employed in the making of knitting wares, passementerie workers, wood silk workers, etc. **[146]**

2. All those engaged in the making of garments and other goods of silk, artificial silk, linen, cotton and woolen fabrics, such as clothing workers, workers in collar and shirt factories, including all salesmen, clerks, stenographers in distribution places (dry goods stores).

3. All workers employed in establishments where wearing apparel is made of fur, felt, straw, etc., as furriers, glove makers, hatmakers, straw hat makers, millinery workers.

Sub-Department C.

Manufacture of Leather Goods and Substitutes.

This sub-department is composed of workers organized in three sub-divisions:

1. All workers employed in tanneries and leather preparing houses.

2. All workers engaged in the manufacture of shoes and boots, as cutters, lasters, inseamers, etc., which, of course, includes all clerks and stenographers in the offices, and the clerks in shoe stores and distribution houses of shoes, teamsters, engineers, firemen, etc., working in the shoe industry.

3. All workers in other leather goods, or substitutes of leather, such as harness makers, and horse goods makers, workers in belt factories, etc.

Sub-Department D.

Metal and Machinery Manufacture.

All workers employed in making goods of any kind of metal are grouped together in this sub-department, three subdivisions joining together to constitute the same in which are organized:

1. All workers in blast furnaces, steel mills, rolling [147] mills, tin plate mills, wire mills, nail mills, rail mills, including all workers in plants where by-products are manufactured.

2. All workers engaged in the building of engines and machinery, such as pattern makers, core makers, molders of iron, and other metals, machinists, all other workers in all these plants, including the workers in the power departments of such plants, machinery movers and teamsters, etc.

3. All workers employed in making of metal wares and products other than engines and machines, of different metals, such as workers in watch factories, knife and saw factories, in the making of jewelry goods, and utensils, and of instruments; silver smiths, goldsmiths, etc.

Sub-Department E.

Manufacture of Wood Articles.

This sub-department consists of organizations of workers employed in the manufacture of goods out of wood, or principally wood. It would embrace all workers in piano factories, planing mills, furniture factories, hotel and bar fixture factories; all workers in cooperage shops, in reed and rattan factories, box factories, etc. Of course, the workers of each of these industries would form a branch organization,

embracing all the workers of one or more plants in which a given article is manufactured, for instance, in an industrial union of piano workers would be organized not only the wood workers, but also the metal workers, tuners, polishers, piano movers, etc., employed in that industry.

Sub-Department F.

Manufacture of Chemical Goods.

This sub-department comprises all workers employed:

1. In the production of paint, drugs, rubber, guttapercha, [148] powder, dynamite, melinite, and all explosives; inks, perfumes, turpentine, celluloid, soaps, etc., including chemists engaged in these pursuits, all workers in drug stores and pharmacies, as clerks and salesmen, etc.

2. All workers employed in the making of cellulose and papers, for printing and commercial purposes.

Sub-Department G.

Manufacture of Foodstuffs.

Made up of five industrial subdivisions, this subdepartment is composed of workers engaged: I. In the production of foodstuffs made of grain and cereals. II. In the production of foodstuffs made of animal matters. III. In the production of liquids for consumption. IV. In the production of narcotics. V. In the distribution of foodstuffs. As the process of production is not finished until the goods are put to use by the consumer all workers in the distributing places, that is, the workers in hotels, inns, restaurants, saloons, etc., form organizations

connected with the foodstuff sub-department.

I. Comprises all workers in flour and cereal mills, in bakeries, biscuit factories, candy and confectionery shops, in sugar refineries, in fruit packing and canning plants, including, of course, all engineers, coopers, clerks, salemen and delivery teamsters employed in any of such establishments.

II. This subdivision comprises all workers employed in meat packing houses, in all the fifty-nine factory departments; dairy and milk depot workers and deliverers, all workers in fish-packing houses.

III. In this are organized all workers in wine and whiskey distilleries, in breweries, malthouses, vinegar factories, [149] ginger and cider mills, all employed in yeast production, and production of soda and soft drinks. These, as all other industries, include the workers in the power-furnishing departments of all these plants and the workers in the delivery and distributing stations, also clerks, stenographers in the offices, etc.

IV. The fourth subdivision comprises all workers employed in the manufacture of tobacco goods; cigarmakers, stogiemakers, cigarette makers, all other tobacco factory workers, clerks in cigar and tobacco stores, distributors, etc.

V. In the fifth subdivision are organized all workers in hotels and restaurants and saloons, as cooks, waiters, bartenders, bakers and butchers in hotels, barbers, if employed in the hotel service, chambermaids, hotel clerks, etc., chauffeurs and cabdrivers, if they are in the hotel service exclusively.

Sub-Department H.

Printing.

All workers in the printing and lithographing institutions are organized in this sub-department. Printers, pressmen, bookbinders, photo-engravers, stereotypers, lithograph artists and printers, designers, editors of newspapers and magazines, proof-readers, including, of course, all machinists, engineers, firemen, electricians, janitors and clerks in the printing industry.

V.

DEPARTMENT OF BUILDING AND CONSTRUCTION.

This department is composed of three national subdivisions: [150]

A. All workers employed in the erection and construction of buildings are organized in this subdivision: Architects, designers, excavators, stonemasons, bricklayers, hodcarriers, cement workers, carpenters and joiners, electricians, elevator constructors, painters, architectural iron workers, plumbers, building material teamsters, etc. But these crafts are not organized in craft groups, but they form according to the nature of their work branch organizations of the one "Building Constructors Industrial Union" in every locality.

B. In this subdivision are organized all workers employed in the construction of roads, tunnels and bridges, such as pavers, bridgebuilders, workers employed in the building of docks, subways, in the construction of irrigation works, of sewers, of canals, etc.

C. All workers engaged in the construction of ships and vessels are organized in this subdivision; in the building of steamers, launches, tug boats, as ship caulkers and carpenters, iron ship builders, machinists, boilermakers, coppersmiths and all other branches of workers directly engaged in this industry.

VI.

Department of Public Service.

This department is composed of workers organized in six national industrial unions, constituting each a component part of the department organization.

A. Hospital and sanitariums.

B. Sanitary protective division.

C. Educational institutions.

D. Water, gas and electricity supply service.

E. Amusement service.

F. General distribution. [151]

A. In this subdivision are organized all workers in hospitals and health-restoration resorts, sanitariums, etc., such as physicians, nurses, waiters, cooks, attendants, laundry workers in these institutions, etc.

B. This is constituted of workers employed in the protection of health and public safety, that is, all workers employed in the cleaning and caretaking of streets, public places and parks, the street protection workers, all workers in immigration stations, house janitors, office building workers, all workers employed in burial places, as funeral teamsters, embalmers, grave diggers, crematorium workers, etc.

C. In this subdivision are organized all workers

in public schools, and all institutions of learning, education and instruction, such as teachers, lecturers, librarians, including also all workers keeping the institutions in sanitary and wholesome condition, such as school and university wardens, janitors, engineers, firemen, etc.

D. This subdivision is composed of workers in municipal power houses, pumping stations, all workers in plants supplying to communities power, gas, electricity, etc.

E. All workers in theaters, amusement places, concert halls and gardens, on ball play grounds, in summer-resort and amusement places organize themselves into this subdivision, such as actors, musicians, stage workers, singers, ushers, waiters in amusement places, etc., also all workers engaged in the making, production and exhibition of moving pictures.

F. The big department stores and distribution houses, with thousands of workers employed in each, have more or less assumed the functions of public service institutions. Not one specialized article, but in fact any and all kinds of commodities [152] and fabrics are going through the process of distribution.

It would be well-nigh impossible to organize the workers in the service according to the goods that they handle in the process. Therefore, all the workers in these distribution stores are organized together into unions as component parts of the one subdivision, which in turn is a part of the department organization of public service workers.

Tailors in department stores, clerks in the shoe

department of a department store, or any other workers, irrespective of the place of employment, of the tools they use, are organized together; stenographers, clerks, tailors, repairers, freight handlers, packers, department store drivers, bakers, candy makers, etc., in these stores, all are members of one industrial union.

CONCLUSION.

When now and then advocates of a better system of society refer to the new unionism they do it, in most cases, without knowing fully the distinction between the old kind of unionism and the unionism that advocates—One Big Union for the Entire Working Class the World Over! But, even if the critics of this plan of action disagree with the author of this booklet as to the means to attain a desired end, they can no longer plead that there never has been any literature, presented in which the program of the industrial unionists has been enunciated.

Organize industrially; organize right! This is the call to the downtrodden heard all over the world. In increasing numbers the proletariat of every country is enlightening itself on the subject, and everywhere workers are preparing for organization in which they will find the embodiment of their [153] collective power and the instrument for direct action, as occasion and conditions may command. All countries of the world are governed, principally, in the interests of the small class controlling industrial combinations. Whenever the workers aimed heavy blows at these interests directly, that is, when they refused to serve, temporarily, in the production process of these

industries, the exploiting class all over the world burst out in frantic denunciations of the forces that had so little regard for private property.

The industrial unionists propose to organize the workers for more militant action within present day society, so that, with every advance gained, the workers will gain an appetite for more and for all, and will find the means to get it.

And in all these days of unrest and struggle the industrialists are preparing the administrative, the government agencies, for the industrial commonwealth. Representatives elected by the workers, organized in their industrial organizations, will constitute the industrial parliament of the future, the workers' commune in municipal, national and international affairs.

STUDY THE CHART.

Observe how commercialism, the main factor in the development of the capitalist system of production, encircles the whole globe with the means and tributaries at its service:

Transportation facilities as the messengers for the exchange of products between countries and continents know no boundary lines—land, water, air have been conquered and rendered servants of the monstrous forces behind the prevailing industrial system of production and exchange.

Industrial development has wiped out boundary lines [**154**] between sectional territories.

National dividing lines disappear before the invincible force of the conqueror.

Continents so long separated by landmarks and obstacles of natural origin are linked and joined together by the gigantic weld of that international carrier of exchange and distribution.

But the functions of that agent of a social system are still today confined to the service of profit-production for a few.

What still remains, in the minds of mankind, as a force for separate nationalities, is merely imaginary.

A heavy load of traditional falsehoods, holding living human beings in a bondage of ignominious, deep-rooted, and ingeniously fostered intellectual, and hence also in industrial serfdom must disappear; national separation must be swept aside by the advancing forces of international co-operation before the highest and most marvelous stages of industrial development, social progress, and perfection in the utilization of all elements subservant to the generating powers of mankind, can be achieved, and a higher order of civilization be established.

THE SECOND INTERNATIONAL LINE.

Observe also how a second transcontinental line connects the world's component parts into one inseparable whole. Science and scientific research and discoveries are the international agencies by which the riddles and miracles of the universe, in all their magnitude are solved and explained. Institutions of learning, schools and universities are linked together by the uniformity of fundamental laws governing science [155] and the dissemination of knowledge and discoveries.

Likewise are evils and afflictions, springing irresistibly from the same sources, suffered alike by all living beings throughout the world. Remedies and means of prevention must, consequently, assume the character of international agencies, deriving their support from the necessity of eliminating and curing the evils, and of removing the causes for their existence.

Hospitals, as curing stations; cleaning, sanitary and protective agencies, as institutions for prevention; the supply stations of water, light, and other means of public need are therefore joined together with the institutions of learning and with the agencies for recreation and amusement, into one great chain of international dependence, and are formed and maintained in the pursuit of functions preventive as well as beneficial as the promoters and protectors of public interests and universal weal.

FOUR CARDINAL FUNCTIONS.

Observe then how in the complex process of production of the necessities of life four cardinal functions comprise the interlocking chain of industrial activity, through which the resources of the earth must run before their ultimate use.

A. From the soil, the woods, and the waters all material required for producing purposes is secured by the labor of the millions serving in the social process in raising and procuring the raw products for food, raiment and shelter.

B. From the bowels and the treasures of the earth labor puts out the material for fuel and the essential things which, after being transformed, com-

prise the implements and **[156]** machinery of production and distribution.

C. With the matter thus furnished production proper for the providing of all necessary things of life and comfort is carried on in the various, but inter-depending places of production, mills and factories,

D. With all these things combined the constructive hand of labor builds the houses of shelter for the protection of life and matter against the adversities of nature's forces, and harnesses them to render service for social good.

LABOR THE SOLE PRODUCER.

To all of the making and development of these social institutions the workers, and they alone, contribute their intellect and their manual labor. They have created the instruments to produce wealth with, and improved them as time rolled by.

These institutions are organized in their operative functions to yield profits for a few who never did, nor do, contribute to their making and maintenance, except in a manner to protect them in the possession of things that they did not make.

The human forces rendering these instruments, agencies and implements useful to all society, and adding value to matter and forces of nature, are divorced from their creations by powerful combinations of parasitic nature, by which a few control all the co-ordinate stations of industrial life through the means that they have organized and subjected to their rulership. Against these hostile powers the workers must organize their own resources and their

own collective power, in organizations embracing all useful members of society and wealth producers. [157]

THE MISSION OF THE WORKING CLASS.

A labor organization to correctly represent the working class must have two things in view.

First: It must combine the wage-workers in such a way that it can most successfully fight the battles and protect the interests of the workers of today in their struggles for fewer hours of toil, more wages and better conditions.

Secondly: It must offer a final solution of the labor problem—an emancipation from strikes, injunctions, bull-pens, and scabbing of one against the other.

Observe

How this organization will give recognition to control of shop affairs, provide perfect industrial unionism and converge the strength of all organized workers to a common center, from which any weak point can be strengthened and protected.

Observe, also,

How the growth and development of this organization will build within itself the structure of an industrial democracy, which must finally burst the shell of capitalist government and be the agency by which the workers will operate the industries and appropriate the products to themselves.

One Obligation for All.

A union man once and in one industry; a union man always and in all industries. Universal transfers, universal emblem.

All workers of one industry in one union; all unions of workers in one big labor alliance the world over.

Industrial unionism is not confined to one country. The best expression of it is found in America, in the Industrial Workers of the World, although the organization may appear to **[158]** be still weak, numerically. But the conditions for the advent of the industrial revolutionary union are most promising, because the most advanced and highly developed industrial system of production is bound to find its counterpart in a similarly perfected organization of the working class on the industrial field.

As presented in this booklet, these institutions for wealth production, so well organized, so masterfully constructed, suggest the best forms of industrial organizations for the workers.

Industries are organized in six big departments, which are composed of forty-three subdivisions.

This arrangement is not arbitrarily fixed, or the product of one man's notion. The best tabulations of statistical experts of different countries have been consulted, and the systematic arrangement will stand the test of scientific investigation.

Of course, it has been stated, and is herewith reiterated that this arrangement of industrial organization of workers would also assure the most effective solidarity of all producing forces in their defensive and aggressive struggles for the amelioration of the evils they suffer under, evils inherent in the capitalist system of distribution of the commodities created by labor.

When the workers organize industrial unions, copied from the institutions in which they are employed, they will be able to stand together as powerful industrial combinations in their skirmishes for better working conditions in any one industry. Not separated by craft divisions, or trade union contracts with the exploiters, they will not only be able to curtail **[159]** production on a small scale and thus also the profits of the employers of labor, but they will abruptly stop production altogether, if necessary, in any one industry, or in all industries of a locality, or of a nation, or they can, when they are powerful enough, shut the factories against the present employers and commence production for use.

The workers, though, must tear down, as a first duty to themselves, all craft demarcation lines, the remnants of a by-gone age. Unhampered by that drag-chain, they can then develop and organize their industrial power. But that power must be guided in its use and exercise by the collective intelligence which will develop simultaneously with the generation of power. Equipped with the power of an industrial organization, with the knowledge gained in the every-day struggles against the oppressors, they will successfully strive for a higher standard of life-conditions, within this system, and they can master things and forces so that they will reach the final goal of all efforts—complete industrial emancipation.

Hundreds of thousands of workers in every civilized country are learning to understand the principles of industrial unionism. Thousands are organizing for the battle of today, for better conditions, and

for the final clash in the future when the general lockout of the parasite class of non-producers will end the contest for industrial possessions and political supremacy.

If you are one of the millions needed to accomplish the task, join the industrial union composed of workers in the shop or plant where you work. If none exists, be the first to get busy. Get others, organize them. Learn to tackle the industrial problems. Show others how the workers will be able **[160]** to run the industrial plants through the agencies of their own creation, locally, nationally, internationally, the world over.

There are organizations everywhere, and where there are none, they will be formed. In the industrial union movement alone will the workers forge the sword, train themselves for the use of all and every weapon that can be utilized in the struggles for a better world. In the industrial union movement the workers will strictly adhere to the great axiom:

"The emancipation of the workers must be achieved by the working class itself.

"Workers of the World, Unite!"

Read the Manifesto, issued by the Industrial Workers of the World. Study the chart described in this pamphlet. Neatly printed on bond paper, 10c.

For information regarding the Industrial Workers of the World, referred to in this booklet, write to Wm. D. Haywood, General Secretary-Treasurer, 1001 West Madison Street, Chicago, Ill. **[161]**

Gen. No. 201,136.
Industrial Workers of the World
I. W. W.
Universal Label.

Name—Neil Guiney.
Address ———.

INDUSTRIAL
WORKERS OF THE
WORLD.
OFFICIAL MEMBERSHIP BOOK.

Issued by authority of the General Executive Board of the I. W. W.

WILLIAM D. HAYWOOD.
General Secretary and Treasurer.
Industrial Workers of the World
I. W. W.
General Administration.

The member is entitled to work in any industry of this organization where employment is obtainable when stamps are affixed, **[162]** showing the member to be in good standing. To be in good standing a member must be paid for current month.

PREAMBLE.

The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life.

Between these two classes a struggle must go on until the workers of the world organize as a class,

take possession of the earth and the machinery of production, and abolish the wage system.

We find that the centering of the management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever-growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

These conditions can be changed and the interest of the working class upheld only by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lockout is on in any department thereof, thus making an injury to one an injury to all.

Instead of the conservative motto, "A fair day's wages for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system."

It is the historic mission of the working class to do away with capitalism. The army of production must be organized, not only for the every day struggle with capitalists, but also to **[163]** carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old.

"LABOR IS ENTITLED TO ALL IT PRODUCES."

Continuation Card
Industrial Workers of the World
I. W. W.

Lumber Workers Industrial Union No. 500

(SEAL)

March 12th, 1917.
Spokane, Washington.

No money should be received without acknowledgment in this book. Members must see that the Financial Secretary places a stamp in the book for each month for which Dues or Assessments are paid.

Name—NEIL GUINEY
Initiated by Del. 341 #400.
Industrial Union No. 500.
—— Branch No. ———.
October 7, 1916.

———————————,
Department.

Lumber Industry,
Lumber Jack, Occupation.
Ledger ———, Page ———.

NEIL GUINEY,
Fin. Sec'y.

Gen. No. 201136. **[164]**

TRANSFER RECORD.

Month—March.
Date—28.
Year—1917.
From Union No.—400.
To Union Number—500.

Secretaries on accepting members from other Unions must immediately notify the Union to which the member formerly belonged of the transfer.

FINANCIAL SECRETARY.

W. Moran Del. #1.

Members must transfer their membership to the Union in the industry where they work in compliance with the rules of the I. W. W. Constitution.
DUES year ending December, 1919.

(Two stamps attached in spaces marked respectively January and February.) Stamps read as follows: (First stamp) I. W. W. Seal; One Month Due Stamp; Paid Jan. 20, 1919. (Second stamp) I. W. W. Seal; One Month Due Stamp; Paid Jan. 20, 1919. [165]

H—1

San Francisco, Calif., May 3, 1919.

Fellow Worker:

Your letter made me feel somewhat Guilty about your Suite case. Also reminded me of when I was wondering if I had a dress to change when I was released.

Neal I am enclosing a key that I think belongs to you, I have two keys in my perse almost alike the other one is brass. I am pretty sure this one I am sending is yours.

Dont supose you sent out any "Bombs" this May day, I didn't send out a single one ether, In-sted of "May Baskets" being found on door knobs these days. Its expect your parsel through the mail, eh:

It seems strange to me that one who knew how to make a Bomb So perfect wouldn't know enough to be positive of sufficient postage.

I am inclined to think if there were any Bombs mailed they were not mailed for the purpose of killing anyone, other then, perhaps a collored Made.

It sounds like conspericy against international "Labor Day" which is an expression of international Brother-hood of the Workers, which is a much different thing then The Legue of Nations. Do you get any News from the out side?

I heard that Haywood was out on bond but dont know if there is any truth to it. Also that a number of the boys were released from Ellis Island.

As my sister is in the Hospital and I am taking care of her Kiddies I do not get in tuch with any of the Boys therefore dont hear much I. W. W. Gossup.

There has ben nothing done with the Spokane cases in-so-far as I know.

Give my regards to Lawranze and any other F/W that may hapen to be standing near you.

I heard that same story from (I guess) the Same Old Conductor. Once run from Milwaukee to some where, I heard it all in the City Jail.

Will close now and if this is poorely spelled Neal, Blame it on the "Portland Bulls" as they confiscated my dictionary with lots of other Such evidence of my

pro-German sympathy's, that I dont supose I will ever get returned.

Hope this finds you knowing more about your future then when you wrote me.

I remain Yours for Freedom,

(Signed) KATE KIDWELL WILBUR,

14 Angelica St., S. F.

Baby Warren! Seeing me enclosing the key ask will that key turn him out of jail Aunt Kate? The first I knew of his knowledge of keys to Jails.

K. [166]

H—2.

Holland, Oregon, 4—27—19.

Neil Guiney

Friend and Fellow Worker

Yours of Apr. 19th received and note your are still a guess of our emigration authorities, they must like your company. received a letter from James Rowan. he says the bunch in Leavenworth are O. K also said there were 37 of the bunch admited to bail there. was an emigration officer there who notified a bunch of them that they were to be deported when they had served there term of imprisonment, among the bunch who are to be deported are ten naturalized citizens Rowan is naturalized himself. he says he does not know when the rest will be admited to bail I sure would like to see Rowan. Noran. and some more of them who have been in so long, get in the open for a while. Rowan is anxious to get some word from Spokane. but I do not get any mail from there, so have no word to send him, I see the A. F. of

L. is still working on the Mooney strike, if they go through with it they are all right. I personaly do not put much stock in the California defence committe, or the A. F. of L. as a whole, they do not seem to be able to get together on any one plan of action, there are to many committies, all trying to function in there own capasity, and no solidarity of action, the Mooney strike in a way will determine our next move, as we are out of water and can do nothing, if the strike goes in to effect we may stay here, if not I will go to Seattle. Harry will go to Portland, but we both figure on being in here next Fall, Harry sends his regards. News are scarce so will close hoping they will make some move in your case I remain your Friend and Fellow Worker,

Yours for
Industrial Freedom,
F. M. DUGGAN,
Holland,
Josephine Co.
Oregon. [167]

H–3.

Leavenworth, Kansas, Apr. 23d, 1919.

Neil Guiney
Fellow Worker

Your letter of Feb 26th received all right and I will now take chances on writing you a few lines in reply, although you told me not to write before hearing from you again. I see that you have been selected as one of the victims of deportation. Well I am pretty much in the same position myself. Some time ago an official of the Bureau of immigration paid

us a visit, and read warrants to a bunch of us who were born in other countries, notifying us that we were to be deported. I was one of the bunch, notwithstanding the fact that I have been in this country for 21 yrs. and have been a citizen for over 12 yrs. The bonds are 1000 00 for this deportation proposition. Of course I understand this deportation will only be put into effect on us when we have finished our time, or in the event of an acquittal by the appeal. Well we should worry. No doubt you have heard that the bonds have been set for 36 of the Chi bunch, but so far none have gone out except St. John who went out last night. Got a letter from Hegge same time as I got yours. He is in New York working for a boss and seems to have recovered his health. Have not seen any financial reports of 500 since the Jan. report, but I hear they are doing good in the Superior Dist. and on the coast. Have not heard any word from the Spokane Dist for a long time and have no idea of what is doing there. Hear from Portland quite often, and it seems the Org. is far from dead there in spite of the closing of the hall. Yes I fully agree with you in what you say about halls. The closing of the halls might be the best thing that ever happened to the I. W. W. Well Neil, I guess you have read of the Sioux City convention, broken up once by a raid by the sheriff, but the end is not yet. By all accounts Hdq. in Chi is doing more business than ever before, and the Org. is getting a strong hold in the east. I think there is no doubt that W. Can. will go solid for the O. B. U. The outlook is fine and is getting better every day.

If they do deport us I guess we will manage to monkey along somehow, so whatever they do it is Jake with your uncle. Well old timer, drop us a line if you get this.

With best withes,
Your for the One Big Union,
(Signed) JAMES ROWAN. [168]

H–4

AN INJURY TO ONE AN INJURY TO ALL

EMANCIPATION

It is the historic mission of the working class to do away with capitalism. By organizing industrially we are forming the structure of the new society within the shell of the old.

INDUSTRIAL WORKERS OF THE WORLD.

Executive Board.
F. H. Little,
Francis Miller,
C. L. Lambert,
Wm. Wiertola,
Richard Brazier.

I
W*W
General
Administration.

Organization
at the
Source
of
Production.

WORKERS OF THE WORLD UNITE!

INDUSTRIAL WORKERS OF THE WORLD.

1001 W. Madison Street,
Chicago, Ill.

Wm. D. Haywood,
Gen. Sec.-Tres.

Telephone
Monroe 6228.

April 23, 1919.

Neil Guiney,
County Jail,
Portland, Ore.

Fellow Worker:

Your letter of April 18 received and note your proposition you wish the convention to take up in

regard to the Canadian situation and undoubtedly something will be done along those lines.

I referred your letter to the present G. E. B. and they say they would appreciate any report you would give as to the activities of the former G E B and general defense committee while you was on same.

A. W. I. U. #400 has been holding its convention in Sioux City and last night when they were almost through an armed mob closed the hall. There were no arrests or violence by the time they wired me. The Mayor stood up for them, but as usual going contrary to the economic power of that city couldn't do anything.

The Organization is growing all over, especially in the East where it has long been so stagnant. Everything looks bright for the future.

With best regards from all the office force, I remain

Yours for Industrial Solidarity,
(Signed) THOS. WHITEHEAD,
TW.J. Acting Secretary Treasurer. [169]

H–5

Superior May 1

Fellow Worker Neil Guiney yours at hand and carfuly read. i sure have a lot of good News to tell you a hall is open in Misoulla and 104 More New Members from Canada $300 one Dell sent in some check for one week oh Neil i sure wish this Election was over and i could go to Canada that is the teratory for you and me to look over this sumer and i feel sure they wont hold you mutch longer on no charge but then i think what has been done and i

have my doubts. Now as to dell there is three from Spokane Grady Scott Dailey three from here and one from Portland and one from Virginia Seattle will send some but Not many as they have only sent in 4 duplicates Now Neal i thought it was allright as Joe McMurphy come here and asked me to se i had a full representation i may have done wrong but i done it for the good of the orginazation i have a hard road to folow as i can plainley se but think i can get out all to the good and you are in very good standing i have hunted up all the reciepts and have the checks all but the one they ar holding in Chicago and will send you a Financial report of mine and one of yours as Soon as the Book Keeper can get one for you did you get the Papers and statment i registered to you I hope you did i will send you a O B U Monthly and Sol and Rebel Workers tonight as they just come from Chicago the O B U is a Peach and John Grady and tom Scott stayed here one day and went to chi last night some more goes to Night Say they say Frank Westerland is to speak in Duluth tonight i would like to hear him this town is on the Bum for sure i leave for chi sat Night for a few day 573 convention Pulled of all O K but look out for the Gen one some stool like in Porland will maby spring one on the Dell. say Neal I feel sure we was Tipped of that day and you cant never make me think eny other way i have done some tall thinking and it look to me so eny way and grady told me some things I can se into Now that fooled me sone i hope to meat you this sumer some where on the firing Line and have a long talk. strike still on the

Fortine steller? otter and Flathead and Wallace say it look good to hin wel will close hoping to hear from you soon hope you get Papers and O B U.

Yours for the O B U
(Signed) G H R [170]

H–6

54616/70 May 5, 1919.

Inspector in Charge,
Immigration Service,
Portland, Oregon.

Acknowledgment is made of the receipt of your letter of the 14th ultimo, No. 5040/30, transmitting record of hearing accorded Neil Guiney. After a review of the record the Bureau finds itself unable to reach a conclusion on the evidence as it now stands. It is, therefore, desired that the alien be accorded a further hearing and questioned thoroughly as to the kind of literature he has distributed while acting as secretary, organizer and delegate. It is probable that he may have distributed the book entitled "I. W. W. Songs to Fan the Flames of Discontent," and this fact should be ascertained. The distribution of this book is sufficient to establish the charge of teaching and advocating the unlawful destruction of property. If possible, copies of sabotage pamphlets found to have been distributed by the alien should be secured and transmitted to the Bureau as exhibits, after identifying the same in the record.

EXACT COPY AS SIGNED BY ALFRED HAMPTON MAY 5, 3, 19, by B.
HM. c/REM Assistant Commissioner General.
Received May 6, 1919. Bureau of Immigration Law. [171]

H–7

U. S. DEPARTMENT OF LABOR.
Immigration Service.

In answering refer to
No. 5040/30.

Office of Inspector in Charge
Portland, Oreg.
April 14th, 1919.

Hon. Commissioner-General of Immigration,
Washington, D. C.

Referring to Bureau file No. 54616/70, and Departmental arrest warrant of February 18th in the case of NEIL GUINEY, an I. W. W. whose deportation this office has recommended, I beg leave to forward herewith copy of a letter the alien has just written to one FRED HEGGE of 27 East Fourth Street, New York City. It is thought some of the statements and insinuations in this letter would be of interest to the Bureau.

The man Hegge is unquestionably one of the I. W. W. leaders, and if he proves to be an alien, it may be that the Bureau will see fit to instruct our New York office to institute deportation proceedings in his case. As of interest in this connection, there is inclosed herewith also the copy of a letter which came to our attention sometime since addressed to Hegge at the I. W. W. Headquarters, 1001 West

Madison Street, Chicago, Illinois, by Nils Madsen from Kristiania, Norway, whither the latter, also an I. W. W. had been deported by this Department.

R. P. BONHAM,
Inspector in Charge.

W.F.W.:MAS. W. F. W.

P. S.—Copy of letter from Guiney to Thomas Whitehead, Chicago, Ill., is also inclosed.

Apr. 21, 1919. Bureau of Immigration Law. [172]

H–8

COPY.

County Jail, Portland, Ore., April 8–19.

Fred Hegge
N. Y. City.

Dear Fred: Received your ever so welcome letter today and you well know how much such a letter is appreciated by anyone in the can.

I do not yet know when my benevolent relative is going to finance my trip home. The hitch seems to come from the lack of information that will obtain proof that I am a Canadian. This I have so far refused to give, so they say that they will hold me here until I kick thru with same. I may be wrong, but from a close study of developments in the progress made by the rising proletariat the world over, I am of the opinion that I will last longer than this old jail will so I am going to stick it out.

In regards to my being arrested and held here, you will remember the G. O. C. decided to move Headquarters to Portland. After their decision all resigned excepting Rogers and left me practically alone to make the move(?) I asked Rogers to make

a thorough investigation of conditions here and he advised me to move at once. I did not at that time know Rogers personally or I would not have relied on his judgment, but would have made a personal investigation. However as the membership was clamoring for the move and having Roger's assurance that all was well I decided to bring everything with me. I got the stuff in here O. K. excepting the supply account cards, which disappeared with Wilson. I had an office going and was getting things in as good shape as possible, although I knew it was only a matter of days untill I would be pinched. As soon as I met Rogers I was sorry that I had put any confidence in him, although I do not question his integrity in the least. All I will say about him is that he is not gifted with an oversupply of either shrewdness or ordinary intelligence. And besides that, I saw as soon as I arrived here that [173] the hall

H–9

and vicinity was infested with stool-pigeons who represented at least three different outfits that are out to get us. These were creating factions and Rogers and several other members were falling for the worst of the whole outfit and were also losing controll of things thru lack of ability to handle the situation. The worst of this work was the suspicion that was rife amongst the membership as everyone suspected everyone else and no one knew how to find out just who were the stools. But to get back to the way I was picked up. There were about five members knew where I had the office located. By a process of elimination I have narrowed this field

down to two who could have given me away. Of course there is a possibility that I was pointed out down on the street or in the hall, and then followed to the office, but as I had been in the office about two hours when the finks came in and got me this is not likely. Another thing that discourages that theory is the fact that one of the mugs that pinched me showed me the order he got from the chief to do so. This order was merely a note bearing my name and my right age (which not one man in a thousand guesses) and my description and telling him to bring me around. Besides that, the chief did not know me by sight a fact that I ascertained while in the station. Moreover, they did not know what position I held nor what my record was until after they got it from Idaho on the day after my arrest. No one in Portland except Rogers knew I was coming here and he would not tell anyone. He also planted all of his and my correspondence referring to the matter and most of the members here did not know for sure whether I had Headquarters here or was just here temporarily. In fact I don't think that the authorities knew anything about my being here untill the day before [174] I was pinched so that again

H–10

everything points to the two parties I have previously mentioned. If these guys are stools, they are not actually working for the local authorities, but may be in touch with them or their stools. There are two outfits in Seattle that I got wind of while there on my way West who are planting stools in all the logging camps to tip off all the "alien agitators"

to the Immigration authorities and it is for one of these that my two birds may be working. It is a cinch that the ones that stooled on me knew me and if I can get my liberty for a week or so to do a little stool work on my own hook I will know them also. But with all of their machinery it took them ten days to find me. Besides that, the records were moved out of town again and I believe are still safe. George Ricker is now acting Secretary and H. G. is located in Superior. You see Ricker was a delegate to the convention which was being held at the time of my arrest and he was nominated from the floor untill such time as ballots could be got out and a Sec. elected in the proper manner. Ballots are now out and a Sec. will be in in about two weeks more.

I am getting along fine and dandy although I do not hear much news of the North-West. As the members around here do not want to write and tip off their whereabouts I have to rely on reports from other parts of the country. Some of my friends come up here once in a while to see me but cannot give me much organization news. However, as far as I can see things are shaping our way fast in this man's country. The reports you see in our papers are not in the least overdrawn and if the rest of the country was in as good shape as the Northwest, we would be able to open [175] all jail doors in the

country by word only. Keep your eye on the North West. Give my best to Lorna and be sure to write once in a while. I made this some lengthy but I

hope you will excuse me this time.

As ever, Yours for the O. B. U.
(Signed) NEIL GUINEY.

P. S.—I might also add that the Portland Police have cleaned up the mess caused by their stools here by closing the hall and giving the stools no place to roost. I am for giving them a note of thanks.

N. G.

Envelope addressed as follows:
Mr. Fred Hegge,
27 East Fourth Street,
New York City. **[176]**

H–12
Kristiania Norway, Nov. 28–18.

Fred Hegge
1001 West Madison St
Chicago Ill.

Fellow Worker & Friend

I arrived here in good shape and am with good health. We had a fine trip across. I found my sister in this city and am staying with her for the present. I have spoken to a few of our comrades and am going to speack on friday next week. You can be sure it is a verry inspireing time over here. The only think which makes it bad for me is my financial situation. If you could spare a few beans it would give me more show to work for our Idea. You may take this up with som of the fellow workers over there. I was clean when I come here did not have a cent. Be sure that things are going fine and dandy. It would be nice if you could send me some literature of all kinds. I will send you a more newse letter

latter on. I am going to write to some of the boys at Leavenworth.

With best wishes to you I remain
Yours for Industrial freedom

NILS MADSEN.

Adr Bertrand Pettersen
Bjerregaard gade No. 13 IIII
Kristiania Norway. **[177]**

H–13

Envelope addressed as follows:

Thos. Whitehead
1001 W. Madison St.
Chicago, Ill.
County Jail, Portland, Ore.

Thos. Whitehead
Chicago, Ill.

Fellow Workers: Yours of the 2nd to hand and note the action taken by the C. R. N. in regards to my loss there. I guess it serves me right for trying to help them out. In future I will confine my good samaritan tendencies to helping out the I. W. W.'s only. I wish you would tell them so.

I am glad to note that you have 500 fixed up in regard to credentials.

In regards to my being held here, mine is a peculiar case. Although I am a Canadian, there is no way of proving it except by my word. At least that is the only things the authorities have to go on so far. They want me to give them some information as to how to get the necessary proof and I will not do so. In order to be able to send me over they have to show proof to the Canadian authorities that I am a Cana-

dian. So that I have them in about the same fix as they have me. They have threatened to hold me here for an indefinite period, but I guess that I can stay here as long as they can keep me.

I note that a bunch of Leavenworth boys are to be turned loose shortly on bonds and I am glad of that. Give them all my best wishes when they come to Chi. That is all I am able to give them right now.

I see that you have a new steno. What has become of Kate?

Remember me to all the office force and tell Miss Serviss to take some Old Taylor for me.

With best wishes I remain as ever,

Yours for the O. B. U.

NEIL GUINEY. [178]

H–14

DEPARTMENT OF JUSTICE. HBL.
Bureau of Investigation, EBH.
Washington.

Address Reply to
Chief, Bureau of Investigation,
And refer to initials,
HBL.
HBL.

April 16, 1919.

Hon. Anthony Caminetti,
Commissioner General of Immigration,
Washington, D. C.

Dear Sir:

Attention Mr. McClelland.

For your information and assistance, I send you photostat copy of an abstract concerning Neil

Guiney now alleged to be in jail near Portland, Oregon. According to our statement he is at present awaiting the decision of the Immigration authorities as to whether or not he shall be deported.

Yours very truly,

W. E. ALLEN,

Enc. Acting Chief.

Received Apr. 19, 1919. Bureau of Immigration. Law.

Law Section for Appropriate Action and Reply. W. L. G. **[179]**

H–15

ALIENS FOR DEPORTATION.

Guiney (or Ginney) Neil.
Chicago, Ill. (1918–1919).
Portland, Oregon (1919).
St. Maries, Idaho (1917–1918).
1814 N. Third Street, Superior, Wisconsin (1918).
254046 (Neil Guiney).
See 36190 (Haywood file).
See D. file 186701–66 (In re fees at Idaho trial, 1918).

Anarchist, I. W. W. delegate and agitator. Sent to Portland, Oregon (1919) from Chicago by I. W. W., having with him $1300 and books of No. 500 Timberworkers' Union. Arrested by local authorities. Interviewed by Agent Bryon. Born in British Columbia (Lilloet), February 3, 1890. Entered U. S. from British Columbia through Gateway, Montana, January 5, 1912, 5 ft. 7 inches in height, wt. 135 pounds. One brother, Bernard Guiney, in France (1917). Occupation—farmer (8 seasons), fire-fighter (2 seasons), lumberman (13 seasons),

teamster (4 yrs.). Common school education. Never voted in U. S.; sound health. Claimed exemption (1917) from military service. No papers. Unwilling to return to British Columbia. Classified by local board (St. Maries, Idaho) as Class V. Division F. (See Agent P. R. Hilliard's report, Chicago, March 8, 1 919). In jail 4 mos. at St. Maries (1918). Turned over to Immigration authorities at Portland, who have requested warrant for deportation. In Multnomah County jail. See Agent Bryon's report, February 17, 1919. In correspondence with James Rowan, Spokane, Washington, July, [180]

H–16

1917. Case of State of Idaho vs. Neil Guiney for criminal syndicalism instituted at St. Maries July, 1917. (Agent Watt's report, October 21). Copy of complaint in Hilliard's report, January 27, 1919. Convicted and in prison, Idaho State Pentitentiary, Winter or Spring, 1917–1918. Intimated (June, 1918) he would go to Montreal and Quebec from Superior, Wisconsin. In Chicago April 20 and November 11, 1918; also active in Chicago (100 N. Madison Street) January 1919. Not a defendant in Haywood case. Activities largely in Northwest over period of about three years (1915–1918). Regarded as a nuisance. (Hilliard's report January 27, 1919). Probably traces of this man in Haywood file No. 36190 (not specially examined). Copy of this abstract to Bureau of Immigration, with letter, 4–14–19. [181]

H–17.

U. S. DEPARTMENT OF LABOR.
Immigration Service.
Office of Inspector in Charge
Portland, Oreg.

In answering refer to
No. 5040/30.

March 21st, 1919.

Commissioner of Immigration,
Seattle, Washington.

I inclose herewith copy of a letter just received this morning addressed to Neil Guiney, an alien I. W. W. now held in the county jail by this Service for probable deportation to Canada.

The letter is written at Spokane by one Dennis Kelleher who gives his address as Box 327, Hillyard, Washington. This man is presumably an active member or delegate in the I. W. W., and if he proves to be an alien, it is presumed that you may desire to institute deportation proceedings. This information is given you for whatever action you deem proper.

W. F. WATKINS,
Acting Inspector in Charge.

WFW:MAS.
Received Mar. 27, 1919.
Bureau of Immigration Law. [182]

H–18.

DUPLICATE.

Spokane, Wash., Mar. 18.

Neal Guiney,

Fellow Worker.

John Grady showed me your letter to him and was surprised to hear that you were not getting any tobacco or any relief down there what in Hell kind of a bunch is there.

John Grady said he would look after that and I am shure he will for he is pretty hard to beat at that.

Tom is hear working he would not go East he dont like the old man. I have not heard from Geo. sence he left I am expecting a letter any time now.

As to Gen. Con. that is the first time I heard about it I will jar his memory about it and also the G.E.B. It is a wonder that they have not informed me I hear from them every other day.

Well Neal the slaves are taking to the O.B.U. like a duck to water I look for the greatest summer we have ever known every where you look the slaves are discontented.

So keep up spirits old top if there was no percution we would not be on the right road. but still our Union grown then some day things will change. Say where do you get that illustrious Gentleman stuff I have been called everything on Earth before but that.

Say do you know anything about $1250 that was

sent to you at Chicago from Enaville Ida about Jan 28/19.

Please inform me.

Yours for the O. B. U.
(Signed) DENNIS KELLEHER.
Box 327. Hillyard
Wash. [183]

H–19.

U. S. DEPARTMENT OF LABOR.
Immigration Service.

In answering refer to
No. 5040/30.

Office of Inspector in Charge.
Portland, Oreg.
March 6th, 1919.

Hon. Commissioner-General of Immigration,
Washington, D. C.

Herewith please find complete record of hearing and exhibits in the case of NEIL GUINEY, arrested by virtue of Department's Warrant No. 54616/70. Your attention is respectfully invited to the comprehensive report of Inspector Watkins who conducted the hearing, and in whose recommendation that this alien be deported to Canada, I most earnestly concur.

Neil Guiney is one of the most active and dangerous exponents of the doctrines of the Industrial Workers of the World with whom we have come in contact. He is not only subject to deportation under the Act of October, 1918, as being a member of an organization teaching the unlawful destruction

of property and the overthrow of our Government and institutions, but by his prominent connection and leadership in the I. W. W. he has most certainly taught and advocated these doctrines as an individual. His arrest, because of his leadership in the organization, was very disconcerting to them, and interfered to a considerable extent with the spreading of their pernicious propaganda in the Northwest. His deportation would tend to have salutary effect, and is much to be desired.

R. P. BONHAM,
Inspector in Charge.

RPB:MAS. [184]

H–20.

(COPY.)

U. S. DEPARTMENT OF LABOR.
Immigration Service.

In answering refer to
No. 5040/30.

Office of Inspector in Charge.
Portland, Oregon.
March 6, 1919.

Inspector in Charge,
Portland, Oregon.

Inclosed please find complete record of hearing and evidence in the case of NEIL GUINEY, subject of Departmental Arrest Warrant of the 18th ult., No. 54616/70, charging said alien with advocating or teaching the unlawful destruction of property. In addition to the charge as contained in the warrant, I formally charged the alien with being a member of, or affiliated with, an organization that

advocates or teaches the unlawful destruction of property, i. e., the I. W. W.

This alien is twenty-nine years old and claims Canadian nationality through birth at Lillooet, B. C. His regular occupation is that of a logger, which he has followed for a number of years past on both the American and Canadian sides of the line. According to his statement, Guiney became a member of the Industrial Workers of the World in October, 1916, and has in turn served in said organization as stationary delegate, branch secretary, traveling delegate and union secretary, which latter position he occupied when recently arrested by the police here. In further proof of Guiney's connection with the I. W. W., his membership card is made a part of this record.

The notorious and unlawful practices for which this organization has been responsible through its members, and which it has openly advocated are so well-known and numerous as to hardly required any extended comment. It is a well-established fact, I believe, that the I. W. W. has long advocated "direct action," sabotage, destruction of property if necessary, and [185] various other means of

H–21.

(COPY)

5040/30. 3/6/19.

gaining the objects sought. In the well-known case of the United States vs. Swelgin, Federal Judge Wolverton of this District held, in effect, some time since that the I. W. W. is "an anarchistic organization opposed to all forms of government, advocat-

ing lawlessness, owing no allegiance to any organized government, and that its adherents are anti-patriotic." The alien, Guiney, is not merely a member of the I. W. W.; he holds an important office in the organization, being Secretary of the Lumber Workers' Industrial Union, No. 500 (having a membership of about 35,000), is a very intelligent individual, and, of course, thoroughly understands the workings of the organization, though clever enough to deny that its teachings come within the prohibition of law. In support of his claim that the I. W. W. does not advocate the unlawful destruction of property, the alien has submitted a resolution denying such advocacy, which is signed by Wm. D. Haywood. This is the same Haywood who, with about one hundred other I. W. W. members, was recently convicted at Chicago of violation of the Espionage Law. I have included with the record some letters from certain of Guiney's personal friends now serving sentences for violation of the Espionage Law, criminal syndicalism, etc., as showing the character of his associates in the I. W. W. Guiney admits his own arrest and prosecution in the State of Idaho on the charge of criminal syndicalism, but claims that, after spending four months in jail awaiting trial, he was finally acquitted by the jury.

This alien, as an officer of the I. W. W., has had a very active part in the spreading of its propaganda, and in the distribution of its literature, and has been very instrumental in furthering its principles and doctrines. His anti-patriotism is proved

by his failure to return to Canada to enlist himself with the Military Forces of his native country, and [186] claiming exemption on this side of the line

H–22

(COPY.)

5040/30 3/6/19.

by reason of being an alien, thereby securing exemption from service in the U. S. Army. Guiney alleges that he has purchased no Liberty Bonds or otherwise supported this Government in the war in a financial way, although admitting that he has no dependents. I believe that the charges against this alien have been fully substantiated, and therefore desire to strongly recommend his deportation to Canada, the country of his nativity and of which he is still a subject.

It has been very difficult in this case, owing to Guiney's obstinacy and apparent distaste for deportation, to secure reliable information as to his birth and residence in Canada. The record of hearing contains all the information that I was able to secure from him on the subject. You will note that he claims to have a younger brother, Bernard Guiney, who is said to have enlisted with the Canadian Over-Seas Forces from Winnepeg. Guiney admitted to me that he has relatives and friends in British Columbia and Alberta through whom his Canadian citizenship might be established, but he steadfastly refuses to divulge their identity or exact whereabouts. I would suggest that the alien's photograph be furnished the Canadian authorities for

their assistance in investigation of this alien's nationality.

W. F. WATKINS,
Immigrant Inspector.

WFW:MAS. [187]

H–23.

U. S. DEPARTMENT OF LABOR.
Immigration Service.
REPORT OF HEARING
in the Case of
NEIL GUINEY,

Under Department Telegraphic Warrant No. ——, dated February 18, 1919.

Hearing conducted by W. F. Watkins, Immigrant Inspector, at office of Inspector in Charge, Portland, Oregon, on February 20th, 1919.

Minutes taken and transcribed by Margaret A. Scott, Junior Clerk.

Said Neil Guiney being able to speak and understand the English language satisfactorily, an interpreter, competent in ——— was not employed.

Said Neil Guiney was then informed that the purpose of said hearing was to afford him an opportunity to show cause why he should not be deported to the country whence he came, said warrant of arrest being read, and each and every allegation therein contained carefully explained to him. Said person was then offered an opportunity to inspect the warrant of arrest and the evidence upon which it was issued, which privilege was ——— accepted; and alien being first duly sworn ———, the following evidence was then and there presented.

Q. What is your name? A. Neil Guiney.

Q. Where were you born? A. Lillooet, B. C.

Q. What was the date of your birth?

A. February 3d, 1890. [188]

H–24.

(COPY)

Q. In addition to the charge in the formal warrant, I charge you with being a member of, or affiliated with, an organization that advocates or teaches the unlawful destruction of property.

Q. You are now twenty-nine years old, are you?

A. I am.

Q. Married or single? A. Single.

Q. Have you ever been naturalized in any country? A. No.

Q. You are still a subject of Canada, are you?

A. Yes.

Q. Where was your father born? A. Ireland.

Q. Are your father and mother living?

A. No, neither one.

Q. Have you any brothers living in this country or in Canada? A. No.

Q. Have you any relatives whatsoever in Canada?

A. Distant relatives only.

Q. Is there any way of proving your birth in Canada?

A. I presume so. I guess they have birth records.

Q. How large is Lillooet, B. C.?

A. Small town. It used to be a trading-post on the Caribou Road.

Q. Do you know anyone in Lillooet who knows of your birth there?

A. I don't think so. Let's see. I don't know who is in Lillooet now.

Q. How long since you have been in Lillooet?

A. About nineteen years.

Q. Where did you live after you left Lillooet?

A. Sudbury, Ontario.

Q. How long did you live there?

A. About three years, nearly four years. Then I went to work in the woods. The first time I came into this country was in 1906 or '07. I have been back and forth across the line since then on various occasions. In the spring and early summer of 1911 I worked for the Crows' Nest Lumber Company. I drove for them on the Kootenay River. They had their headquarters at Wardner, B. C. I started in at a place called Wasa, a road-house about forty miles above [189] Wardner. In the late sum-

mer of 1911 I worked in the woods for the Adolph Lumber Company, at Baynes Lake, B. C. The camp was located near Elko, then Baynes Lake. I worked for a lumber company at Moyer, B. C., in the winter of 1911. Then I came across to this side. I was over here about five months, with the Humbird Lumber Company, out of Sandpoint, Idaho. Then I went back to Canada again and went up north, up around Prince Albert, Saskatchewan. I was up there around in January, 1913. I was working for Kenney Brothers, contractors, east of Prince

Albert on the Canadian Northern, at Mafeking, Manitoba, but before that I worked at the Prince Albert Lumber Company on the Sturgeon River. I left there along in January, 1913, and came from there to Edmonton, Alberta. I didn't work there and went from there to Fernia, B. C., and back to this side. I came over here along in the spring of 1913, and worked for contractors, Skinner & Held, twenty-two miles out of Troy, Montana. They were contracting for the Bonners Ferry Lumber Company at an old mining camp called Sylvanite. Then I worked for a contractor named Case, at Clarkes Forks, Idaho, then for Stack & Gibbs on the north fork of the Coeur d'Alene River, Idaho—driving logs, then working for the Black Foot Lumber Company, Missoula, Montana. Then I went to the harvest fields in Dakota. Since that time I have been working at various places on the United States side of the line, mostly in logging camps except in harvest time when I have been in the harvest fields every fall.

Q. When was your last entry into the United States?

A. In the spring of 1913, either February or March. I think March.

Q. Where did you cross the line?

A. Gateway, Montana, by the Great Northern Railroad.

Q. Were you inspected by the United States Immigration [190] authorities then?

NEIL GUINEY (3)

H–26.

A. No, merely asked me where I was going, where I belonged and how much money I had. The inspector who examined me was an old fellow with one eye bad, or gone, and he used to let lumber jacks by without much questioning because we traveled back and forth so much they didn't pay much attention at that time.

Q. Did you tell the inspector that you were a Canadian? A. Yes.

Q. Were you asked whether or not you were coming for a temporary or permanent residence?

A. Yes.

Q. What did you tell him?

A. I told him I didn't think I was going to stay over here.

Q. What is your religion?

A. My folks were Roman Catholics.

Q. Do you know whether or not you were baptized in any church in Lillooet?

A. Well, you want to understand that there was no established church there then. There were Indian missions throughout the country and the priests used to make the rounds, and I presume I was baptized.

Q. Would there be a record of your baptism?

A. Yes, in Victoria. I think there is, anyhow, because that's where the records were kept in those days.

Q. Do you know whether or not your birth was recorded with any public office?

A. I never tried to find out. Guess it was, though.

Q. Have you ever voted in Canada? A. No.

Q. Is there any way in which you can prove your Canadian citizenship?

A. I have been trying to figure that out. I don't know of any way, unless you can find my birth record. My mother died about twenty-five years ago. My father, at the time of his death, about ten years ago, was a construction foreman in charge of a crew on the Algoma Central Railroad, out of St. Mary's, Ontario. **[191]**

NEIL GUINEY (4)

H–27.

Q. What is your occupation? A. Lumber jack.

Q. Are you working at that trade at the present time? A. No.

Q. What are you doing now?

A. Secretary for the Lumber Workers' Industrial Union of the I. W. W.

Q. How long have you been a member of the I. W. W.? A. Since October 7th, 1916.

Q. How long have you been a secretary in that organization?

A. Since the latter part of September, 1918,—first of October. That is, secretary of the Lumber Workers' Industrial Union.

Q. Did you hold any position in the organization prior to last fall?

A. Yes, I was stationary delegate, branch secretary and traveling delegate.

Q. Where are your headquarters?

A. Right here, now.

Q. How long have you been in Portland?

A. Since the tenth or eleventh of February.

Q. As Secretary of the Lumber Workers' Industrial Union of the I. W. W. you are in charge of the union headquarters here? A. I am.

Q. You had just opened up your offices when you were arrested by the police, had you not? A. Yes.

Q. How large a membership have you in the Lumber Workers' Industrial Union?

A. Our records will show about thirty-five thousand members. That includes the membership in the United States and Canada.

Q. And this one union, 500, covers the whole territory, does it? A. Covers the lumber industry.

Q. Are you in the pay of the Industrial Workers of the World?

A. I am, or was when I was arrested. I am not being paid now because I am not functioning.

Q. What is your salary?

A. Twenty-eight dollars a week.

Q. Does this account-book with the Hibernia Savings Bank representing a deposit of $1,300 in your name on February 11th, 1919, represent your own money or that of the I. W. W.? [192]

NEIL GUINEY (5)

H–28.

A. The I. W. W. (Account book returned to Guiney.)

Q. Is this your I. W. W. membership card, No. 201,136? A. Yes, that's it.

Q. Were you registered under the Selective Service Law? A. Yes.

(Exhibits classification card of local board for Benewah County, St. Maries, Idaho, in the name of Neil Guiney, Order No. 359, Serial No. 48. Classified and recorded in Class V.)

Q. How did you come to be placed in Class V?

A. As an alien.

Q. Did you claim exemption because of your being an alien? A. Yes.

Q. Have you anyone dependent upon you for support? A. No.

Q. Why did you not return to Canada and serve in the military forces of that country during the war?

A. I don't know as there was any special reason why I didn't.

Q. Merely that you didn't wish to go to war?

A. That's the only reason.

Q. Have you been back to Canada since 1913?

A. No.

Q. Under what name were you employed at these various places in Canada and the United States?

A. Under my own name all the time.

Q. The charge as contained in the warrant of arrest has been read and carefully explained to you, what have you to say as to that charge?

A. Why, in the first place I do not myself, nor to the best of my knowledge does the organization to which I belong, advocate either the overthrow of the United States Government or of any other government by either violence or any other means. Neither does it advocate the assassination of any official of this Government or of any other government,

nor does it advocate the assassination of anybody whatsoever. I do not advocate, nor to the best of my knowledge does the organization to which I belong advocate, the unlawful destruction of property in any way whatsoever. [193] I am not a crimi-

NEIL GUINEY (6)

H–29

nal, nor is the organization to which I belong a criminal organization, to the best of my knowledge.

Q. As Secretary of the Lumber Workers' Union of the I. W. W., just what are your duties?

A. Why, to look after the accounts of the organization, that is, the lumber workers' part of it, and look after the funds of the organization. To supervise the work of organization, keep in touch with the members, answer correspondence, and so on.

Q. It is part of your work to superintend the distribution of the I. W. W. literature among the members of your organization, is it not?

A. Yes.

Q. And, of course, as an officer of that organization, and carrying out its work, you are, I take it you are, in sympathy with the literature and propaganda they *out* out?

A. Yes, to a large extent. There are some views that some writers take which I don't agree with, but as a whole with the object and aims of the I. W. W., as set forth in its preamble and much of its literature, I am thoroughly in accord.

Q. You are in accord with the preamble and constitution of the I. W. W.?

A. Not with the constitution. There are some

technical points that I do not agree with, and if I am ever present at any convention of the I. W. W., will do my best to have them changed, but, of course, the constitution itself has nothing to do with the principles of the organization, as the constitution is merely a form of carrying on work.

Q. Having a leading part in the distribution of the literature of this organization, you are doubtless familiar with their various teachings and propaganda, some of which I quote as follows: "As a revolutionary organization, the Industrial Workers of the World aims to use any and all tactics that [194]

NEIL GUINEY (7)

H–30.

will get the results sought with the least expenditure of time and energy. The tactics used are determined solely by the power of the organization to make good in their use. The question of 'right' and 'wrong' does not concern us. . . . Failing to force concessions from the employers by the strike, work is resumed and 'sabotage' is used to force the employers to concede the demands of the workers." On the subject of sabotage the following is quoted: "If you are an engineer you can, with two cents' worth of powdered stone or a pinch of sand, stall your machine, cause a loss of time, or make expensive repairs necessary. If you are a joiner or woodworker, what is simpler that to ruin furniture without your boss noticing it, and thereby drive his customers away. A garment-worker can easily spoil a suit or a bolt of cloth. If you are working in a department store, a few spots on a fabric cause it

to be sold for next to nothing. A grocery clerk, by packing up goods carelessly, brings about a smash-up. In the woolen or haberdashery trade, a few drops of acid on the goods you are wrapping will make the customer furious. An agricultural laborer may sow bad wheat in wheat fields, etc." Another excerpt from Vincent St. John's pamphlet reads as follows: "Interference by the Government is resented by open violation of the Government's orders, going to jail *en masse,* causing expense to the taxpayers—which is but another name for the employing class." "In short, the I. W. W. advocates the use of militant 'direct action' tactics to the full extent of our power to make good." What [195] have you to say to those teachings?

NEIL GUINEY (8)

H–31.

A. Well, we will take them up *seriatim.* "As a revolutionary organization, The Industrial Workers of the World aims to use any and all tactics that will get the results sought with the least expenditure of time and energy." But "any and all tactics" does not necessarily mean destruction, overthrow of government, or assassination. In the first place, violence is a weapon of weakness, and when you use violence or destruction, you show that you are weaker than the other class, and in the end only invite destruction upon yourself. The question of "right" and "wrong." "Right" and "wrong" are relative terms, or in other words it is merely a matter of viewpoint. What the working class would

consider "right" for them, such as higher wages, shorter hours, better working conditions, etc., might be looked upon by the employing class as entirely "wrong" because it means decreased profits. Now, the only question for the working class to consider as a class is, "Are better wages, better working conditions, more food, clothing, shelter for ourselves, better chance to educate our children, etc., 'right' for us, if so, let us have them." If that means tying up an employer's factory, or his industry, whatever it is, causing him loss of money, which he considers "wrong," all we have got to consider is whether the "right" on our side outweighs the "wrong" on his. I want to make a definite statement regarding sabotage and the I. W. W. Up to the spring of 1918 various individuals, some of them members of the I. W. W., some who had never heard of the I. W. W., advocated sabotage as a weapon of offense and defense for the working classes. During this period no official action had been taken by the I. W. W. in respect to sabotage, some of them liking it, others

did [196] not. Many of them advocated it and at various instances it was used, but in view of the fact that the use of sabotage, or the advocating of sabotage, was reflecting upon us, and threatening to become a boomerang against us as an organization, in April, 1919, the General Executive Board of the I. W. W. took a definite stand in regard to sabotage. This is in the form of a resolution signed by William D. Haywood, Francis Miller and C. L.

Lambert, stating that, on account of the distorted meaning that had been given to the word sabotage, and also on account of the fact that the capitalist papers were using the word sabotage to create a bogy man of the I. W. W., with which to scare the people, that the I. W. W., from that time on, should go on record as being opposed to sabotage, and that we would destroy all literature on hand in any part of the organization which taught or advocated sabotage. This has been done, and I am prepared at any time to produce a copy of this resolution which has been circulated broadcast by various officers of the I. W. W. Since being in office myself, I have not handled any sabotage literature, neither have I handled the pamphlet by Vincent St. John, from which excerpts have been read into this record.

Q. You do not deny that the I. W. W. organization has advocated the unlawful destruction of property? A. I do deny it, yes.

Q. Do you deny that sand or emery dust dropped into a machine is not injurious to the machinery, or that other similar practices which the I. W. W. have advocated are not destructive?

A. I want to deny that the I. W. W. ever advocated them as an organization. As a matter of fact, I covered that in my previous statement, that the I. W. W. as an organization never took any official stand on that matter. [197]

NEIL GUINEY (10)

H–33

Q. Do you deny that the propaganda and literature, and the pamphlets, posters and stickers scat-

tered broadcast by the I. W. W. have not taught or advocated any sort of lawlessness, or destruction of property?

A. Well, that depends on what you mean by being scattered by the I. W. W. Do you mean our official literature, or pamphlets written or circulated by members of the I. W. W.?

Q. The pamphlet issued by Vincent St. John bears the I. W. W. label, and I take it is an official document of that organization.

A. That is the universal label that is known as the "Union Bug." It is not official.

Q. Why is this pamphlet that you claim as unofficial found in all I. W. W. halls and reading rooms?

A. Why, it was written by Vincent St. John and Vincent St. John was in close touch with the I. W. W.

Q. He is an authority on I. W. W. history, structure, and methods, is he not? A. Yes.

Q. And anything that he wrote as to its history, tactics, etc., would be just about correct, wouldn't it?

A. Up to the time that he left the organization.

Q. This pamphlet is printed as having been revised in 1917? A. Yes.

Q. Do you claim that the organization has changed some of its tactics since that time? A. I do.

Q. Do you believe in the efficacy of this sticker: "Bolsheviki means majority. Who are the Majority? The Workers. Let the Workers Rule this Nation. Join the I. W. W."

A. Why, that question is rather crudely put. I believe in majority rule. As a matter of fact, I

think the actual meaning of the word "democracy" means majority rule.

Q. Are you in sympathy with the Bolshevik party in Russia, and their practices?

NEIL GUINEY (11) [198]

H–34

A. Why, as a working man, I am in sympathy with any effort made by the working class to better their conditions as a class. As to the Bolsheviki themselves, I do not know enough about it to make a definite statement.

Q. Are you in sympathy with any means by which desired ends might be gained for the working class, be they lawful or unlawful? A. Why, no.

Q. Do you believe in sabotage as it has been practiced by the I. W. W. members?

A. I do not believe in sabotage, whether as a weapon used by the working class or used against them. As a matter of fact it has been used against them more than it has ever been used by them.

Q. I will show you a verse entitled, "The Call of the Lumber Camp," bearing a postscript by someone signing initials "TEH."

A. A young fellow named T. E. Hawkins.

Q. Where is he now?

A. In the Idaho State Penitentiary, now.

Q. What is he serving time for?

A. Criminal syndicalism.

Q. Have you ever been arrested in the United States prior to this time?

A. Yes, I was arrested on Friday, July 13th, 1917, for a charge of criminal syndicalism.

Q. Whereabouts? A. St. Maries, Idaho.

Q. Were you convicted? A. No.

Q. Were you in jail awaiting trial?

A. Yes, four months and thirteen days before I had a trial. Trial lasted nine days, and I was held eight days after I was acquitted, making four months and seventeen days altogether.

NEIL GUINEY (12) **[199]**

H–35

Q. Do you identify this letter, written at Fulton, Louisiana, on February 3d, 1918, to you by J. F. Beal? A. Yes.

Q. In this letter the suggestion is made that lots of delegates be sent for organization purposes so that when some "get grabbed" there will be more to take their places. Why does the writer anticipate that the delegates are going to get grabbed?

A. Because as a rule they are grabbed.

Q. You mean they run afoul of the officers of the law?

A. Yes, or the officers of the law run afoul of them.

Q. I show you a newspaper clipping which was in your possession, apparently appearing in an Idaho paper, giving a list of aliens, or alien enemies, who have either revoked their first papers, or have never taken out first papers, and who have claimed exemption from military service. The name, Neil Guiney, appears in this list. Does that refer to you?

A. I presume it does.

Q. Have you been arrested upon any other occasions in this country? A. No.

Q. Are you an anarchist?

A. No, I am not an anarchist of any character.

Q. Are you a socialist?

A. Only in belief. I am not a member of the Socialist party.

Q. You are entitled to the privilege of counsel in this hearing who may be present from this time on and represent you. Do you desire to avail yourself of this privilege? A. No.

Q. Have you any reason or argument to offer as to why you should not be deported to Canada on the charges appearing in the warrant?

NEIL GUINEY (13) [200]

H–36

A. Well, there are quite a few ways of looking at that. In the first place I do not consider myself a criminal. I am not, to the best of my knowledge violating any of your laws, neither am I diseased in any way or insane, I don't think. I am not a degenerate of any kind. I am not an anarchist. I have not opposed the United States Government in any way nor advocated opposition to the United States Government. Neither have I advocated violation of any of the laws of this country, nor the assassination of any of the citizens of this country or of any other country.

Q. Do you believe that Haywood and the rest of the one hundred defendants at Chicago were guilty of the violation of law, as convicted?

A. No, I don't believe that.

Q. Or the forty-odd I. W. W. members at Sacramento, California?

A. No. Of course, I am saying that in a broad

way. I am not prepared to say that not any of the forty were guilty of such violation, but owing to the fact that the feeling was so hot in both instances outside of the courts, a feeling created by the press itself which is in reality the molder of public opinion, there is no jury on earth would dare to acquit a bunch of I. W. W.'s, regardless of what they were charged with, for the simple reason that they knew that if ever they went back to their homes, the towns from which they came, after having acquitted these men, they would be subjected to the same form of persecution to which the average I. W. W. organizer is subjected. For instance the lynching of Frank Little, the tar and feathering of our members at Tulsa, Oklahoma, and the whipping of eighteen of our members at Red Lodge, Montana, and many other instances.

Q. Have you any further statement to make?

A. Only this, that I came to this country as a Canadian. I absorbed my radical ideas in this coun-

try, and you want now to deport me for having those ideas. You can take me out of the country, but that won't take my ideas out of my head. Instead of stopping the spread of those ideas you will be helping me spread them, because I will take them with me wherever I go. Furthermore, if my ideas are a menace to this country and I have absorbed them in this country, why should you try to force such a menace on any other country? This is merely stating a reason, understand, why I should

not be deported, not that I care very much where I am.

(Note: It is noted that a number of I. W. W.'s recently arrested at Portland are making this same plea. Evidently they have had a rehearsal.—HMC.)

Q. Do you oppose deportation?

A. Yes, surely.

Q. Have you a brother?

A. I have a younger brother, Bernard Guiney, who enlisted with the Canadian Overseas Forces from Winnipeg. I don't know whether he is still living or not, nor in what branch of the service he enlisted.

(Signed) NEIL GUINEY.

Certified true transcript.

MARGARET A. SCOTT,
Junior Clerk.
March 4th, 1919.

Hearing continued in Multnomah County Jail at Portland, Oregon, on March 14th, 1919.

Present: W. F. WATKINS, Examining Inspector.
MARGARET A. SCOTT, Junior Clerk.

WITNESS, duly sworn, testifies as follows:

Q. Do you know Otto Elsner, signing himself No. 293,458, who writes you a letter from Sacramento, dated January 21st, 1919?

NEIL GUINEY (15) **[202]**

H–38.

A. Only by correspondence. I have met him once or twice.

Q. Was he one of the I. W. W. members convicted at Sacramento recently? A. Yes.

Q. Are you acquainted with the author of this letter written to you from "B. C., Canada," dated February 3d, 1919, signed "Delegate 366"?

A. I am acquainted by correspondence.

Q. What is the name of the party who writes this letter? A. That I refuse to state.

Q. I quote a part of his letter as follows: "Your letter of December 18th just at hand today. I see where the authorities turned the cat loose on this letter as they have the seal on it for being opened by them. It is Hell they can't leave the mail alone in a 'free country.' Some day they will keep their dirty hands off alright." Does that statement reflect the sentiment of the average I. W. W. in regard to the Postal authorities opening mail?

A. I think it is a very natural expression of any one whose mail had been interfered with.

Q. Do you know why these letters were opened?

A. I do not.

Q. Is it your theory or belief that they were opened because of their being correspondence between I. W. W. members or officials?

A. I presume that is the reason.

Q. Do you identify this letter of February 19th, written in the County Jail by you to C. A. Rogers?

A. Yes.

Q. Do you identify this letter written from the U. S. Immigration Station to yourself, signed "Yours for the revolution," addressed c/o E. I. Chamberlain? A. I do.

Q. Who wrote that?

A. A man named Flogaus.

NEIL GUINEY (16). [203]

H–39.

Q. I take it he was held under order or deportation in the Seattle Detention Station?

A. He was.

Q. Among other things this writer says, "We look for the powder to explode Thursday, the sixth, and you may bet they will be some Hell. I live in hopes they will come and take us from here." Do you know what he refers?

A. That first part he refers to the general strike in Seattle. When he says he hopes they will come and take him from there, he means from the U. S. Immigration Detention House, for he had been kicking about the treatment he had received there.

Q. He meant that the strikers themselves would release him forcibly?

A. I don't know just what he meant. Only thing I take it, was that he would be taken out of there.

Q. What does he mean when he signs himself, "yours for the revolution"?

A. Well, he is just expressing a desire to see a new social order come into being. It is an old method of signing letters and articles among I. W. W.'s, socialists, and so on.

Q. This letter dated, Chicago, February 18th, from P. Stone, Acting Secretary-Treasurer of the I. W. W., addressed to you and inclosing copy of a resolution, has been found among your effects. This Bulletin which is signed by three members of the I. W. W. General Executive Board, and promulgated by

Wm. D. Haywood, General Secretary-Treasurer, appears to be an attempt upon the part of the I. W. W. organization to deny their belief in, or advocacy of, sabotage and the unlawful destruction of property. Do you know when this resolution was adopted?

NEIL GUINEY (17). [204]

H–40.

A. In April or May, 1918. I would also state that that is the first official action taken by the I. W. W. in any way regarding sabotage.

Q. Either for or against?

A. Either for or against it.

Q. Then what have you to say about these five forms of stickers printed in black and red, which I show you at this time. Do those not clearly encourage sabotage?

A. The stickers are used by the members as a means of advertising the organization. Sort of silent agitators they call them. Used for propaganda purposes. Those who want sabotage stickers used to order sabotage stickers, send in a design and have them printed. We sold them just as we sell other things. Those who wanted to use them, used them and those who didn't want to, didn't. But since the fall of 1917 no sabotage stickers have been circulated to my knowledge.

Q. If the I. W. W. as an organization was opposed to the use of sabotage, why did they print literature and documents encouraging that sort of action?

A. I did not state that the I. W. W. was opposed to sabotage. I stated that they had never taken any

action one way or another until 1918.

Q. They certainly encouraged it, did they not, by the printing of this sort of stuff, and putting it out with their official seal on it.

A. I—they probably did, yes.

Q. What is the I. W. W. symbol for sabotage?

A. Their symbol for sabotage? They have many symbols. Sometimes the black cat—sometimes the wooden shoe.

Q. Do you know who originated those symbols?

A. Well, the wooden shoe, that is a sabot, part of the name sabotage. Sabotage is a French word brought from France. Means "work carelessly done," or "kick with a wooden shoe." The word

originated, I think, among the textile workers in France.

Q. I meant to ask who originated the symbol of the black cat?

A. I don't know. I take it, though, that as the black cat is a symbol of bad luck, they figure that sabotage is bad luck for the employer or any one against whom it is used.

Q. Did you, yourself, ever purchase any Liberty Bonds or subscribe to any War Savings Stamps, etc?

A. No.

(Signed) NEIL GUINEY.

Certified true transcript.

MARGARET A. SCOTT,
Junior Clerk. [206]

H–42.

Sticker in red and black. Picture of man wearing sabots. The following printing appears:

"I. W. W.—SOLIDARITY—Takes the Whole Works—Join the ONE BIG UNION.

Another sticker in red and black with the following printing:

"SLOW DOWN—Respect yourselves
Protect yourselves—
The hours are long, the pay is small
So take your time and buck them all.

Another sticker showing picture of clock and two black cats, reading as follows:

WHAT TIME IS IT?
Organization—
I. W. W.
Organize Now—Organize Right.

Another sticker reading as follows:

BOLSHEVIKI MEANS MAJORITY.
WHO ARE THE MAJORITY?
THE WORKERS.
LET THE WORKERS RULE THIS NATION.
JOIN THE I. W. W.

Another sticker—showing picture of red flag with the following words printed on flag:

"Abolition of the Wage System.

Also picture of sabot on flag and underneath are the words:

Join the I. W. W. for Freedom from Wage Slavery.

Another sticker reading:

Don't Scab—Join the Union of your class the I. W. W. Whenever you *speed up* or work *long hours* on the job you are *scabbing* on the unemployed. For information address I. W. W., 1001 W. Madison St., Chicago, Ill. [207]

H–43

Newspaper clipping as follows:

ATTENTION EMPLOYERS.

The statutes of the state of Idaho provide that no corporation may employ a foreigner who has not first declared his intention of becoming a citizen of the United States, and as the country is confronted with the problem of providing work for the returning soldiers, all aliens should be made to give place to men who have proved their loyal*ly* to their country.

Appended is a list of men, in Benewah county, known as aliens or alien enemies who have either revoked their first papers or who have never taken out first papers, and who have claimed exemption from military service on the ground that they were aliens:

Alexander, Thiros,
Antomoff, Tony,
Angelkoff, Vasil,
Antonio, Lisa M.
Azccapka, Mikat,
Anderson, Samuel,
Anderson, Emil,
Alferson, Ole,
Anderson, Anton,
Baskens, P. A.,
Belchoff George
Bilonjac, Mike,
Boluk, Stephen,
Bell, Emile,
Bilonjac Ilija,
Bkorrina, Robert,
Bruderselt, Knut,
Blazevich, Petar,
Christofferson, N.,
Carlson, Fred,
Cico, Emil,
Chinas, James,

Chuck, Dmiter,
Aspek, Victor,
Achilli, C.,
Antonio, Dom.,
Anderson, Elof,
Anderson, Alex,
Anzjou, E. S.,
Anderson, Otto,
Anderson, Gustaf,
August, Lesz,
Bergeson, Andrew,
Benas, Bill,
Bakken, Morris,
Bodjinig, L. N.,
Boxichovic, Kosta,
Brede, G. E. W. F.,
Bergeman, J. E.
Bowes, John,
Blanusa, Dan, [208]

H–44.

Chalos, Jim G.,
Casper, Carl,
Chiminti, Guy,
Cantoline, Sarerio,
Colocihas, Geo.,
Cantalini, Ginlio,
Demtris, John,
Dincoff, Kireacho,
Dukich, Nick,
Dragos, Pete,
Duhick, William,
Duhick, John,
Dimitroff, E. P.,
Dante, Gazalo S.,
Davis, John,
Dukich, Joe,
Dubee, Albert,
Detric, Pavan,
Enquist, Alben,
Elieff, Stoiko,
Ekman, Edward E.,
Erickson, Albin E.,
Evanoff, Toder,
Eriscon, L.,
Elieff, Pete,
Estes, Ed,
Erickson, Albert,
Erickson, Evert J.,
Fagander, J.,
Fukuoko, Yokichi,
Frkovich, M.,
Fratos, Apostolas,
Fraser, Donald,
Franie, Marko,
Geroff, Latir G.
Grampirtri, Loreto,
Gadjoff, N.,
Ganshe, Theodore,
Gligoroff, E.,
Ginlini, Carmine,
Giampurti, S.,
Gelalis, Leonidas,

Georgeoff, M.,
Guiney, Neil,
Gornorg, Rstip,
Gorich, Roidic,
Holstein, George,
Hansen, David,
Hristoff, Sam,
Hager, Carl,
Hergert, John M.,
Hartvigson, H. O. A.,
Hodjicoff, L.,
Hristoff, Lazar,
Higushi, Segaro,
Hirata, Kamonouki,
Hysing, Hans,
Hagstrom, Olar,
Hirata, Hagime,
Hergert, John,
Halquist, M. A.,
Ignace, John T.,
Iverson, Hans,
Johnson, P. O.,
Julian, Joe,
Johnson, L. Ole, [209]

H–45.

Johnsos, Edward,
Johnson, Peter A.,
Johnson, Carl,
Johnson, Alfred H.,
Jasky, Pete,
Jakick, Dmitar,
Jhansen, Jhan A.,
Jaksic, Petar,
Jackice, Theodore,
Johnson, Nels A.,
Johnson, Christ,
Kola, Mat.,
Kamentsilos, Frank,
Klenk, John,
Koludiger, Thomas,
Kopchell, Chris G.,
Klieshoff, John,
Kostoff, John,
Kuldger, Joso,
Knutson, Knut,
Knutson, James,
Kosovich, Nick,
Konistir, Nick,
Kenezeic, Blaz,
Kandz, Charles,
Kolundzich, Stevo,
Knutson, L.,
Lust, Adam,
Lalich, Eli,
Larson, Matt,
Lond, Joseph,
Larson, Edwin B.,
Leopardo, M.,
Lee, Chong,
Laitinen, Taavetti,
Larson, Gustov A.,
Lockhart, T. E.,
Lazorick, Alex.,

Mello, Dominie,
Moskoff, Dicho,
Monsrud, Alf.,
Mahoney, Patrick,
Mataija, Ilija,
Massaslaw, Philip,
Mataiga, D.,
McLean, J. M.,
Mlinaric, Pavas,
Miller, George,
Mascone, Jos.,
Marcel, Joseph,
Mostowa, Mike,
Munter, Spik E. O.,
Miller, Mark,
Mundry, Nick,
Miller, Mark,
McNaevitt, Pete,
Markovinovic, M.
Molmberg, B. C. F.,
Morash, Geo.,
Nelson, John,
Naumoff, Nichola,
Nylund, Eric,
Noek, Boreric,
Nelson, A. C.,
Naslund, John W.
Nylen, Albert, [210]

H–46.

Oslavsk, Louis,
Olson, Nels A.,
Olson, Henry J.,
Olson, John,
Ottestad, Toralf, O.,
Oberg, Art,
Olson, Carl,
Ose, Ole,
Papiansheff, Panda W.,
Paxton, M. E. E.,
Papvasilau, G. H.,
Pearson, Herman, H.,
Peldo, Chas.,
Pepercoff, Nick S.,
Papagiani, C. S.,
Peterson, Axel E.,
Prosan, John,
Peterson, Charles,
Popovsky, A.,
Porpat, John,
Postulovic, Anton,
Panjeric, Rado,
Plecas, Vaso,
Pearson, Charles,
Pearson, J. B.,
Popoff, Evan,
Postulovich, Peter,
Petrovich, Gazo,
Postulovic, Jure,
Raccnelli, Joe,
Reimer, George,
Radzek, Jake,
Sideroff, Louis,
Shultz, John,

Stepahko, Wasil,
Sterns, John J.,
Storas, Gust,
Seidenschwary, J.,
Stenman, Arvid,
Silenzi, Iovanni,
Sotiroff, Pando,
Stephens, Duncan,
Saratovich, T.,
Stilich, Matt,
Suzaic, Nichola,
Stromgren, Erick,
Scraba, Alex,
Schmidt, Mike H.,
Swanson, Otto,
Saric, Nickola,
Straub, George,
Saari, Louie,
Skoglund, C. T. P.
Skrina, Steve,
Staumates, Tom,
Straub, Harry,
Straub, Henry,
Santman, Gus,
Tadick, Stanley,
Tomick, Steve,
Tonkovich, Djuric,
Tillberg, Eric,
Troiani, Andrea,
Troini, Agostino,
Tamic, Mile,
Uzeno, Soichi,
Uzeno, Sozaburo,
Ungur, Mike, **[211]**

H–47.

Valde, Carl,
Vogrig, Andron,
Vecellis, A. L.,
Whistocken, Baza,
Wasilchuk, N.,
Westburg, Gust,
Welton, Ed M. **[212]**

Education.
Labor is entitled to all it produces.

I. W. W.
General Industrial Workers of the World
Administration.

Organization at the source of production.

Executive Board:
F. H. Little, Fresno, Calif.
Francis Miller, Providence, R. I.
C. L. Lambert, Sacramento, Calif.
Wm. Wiertola, Biwabik, Minn.
Richard Brazier, Spokane, Wash.

INDUSTRIAL WORKERS OF THE WORLD,
1001 W. Madison Street,
Chicago, Ill.

Wm. D. Haywood,
General Secretary-Treas.

Peter Stone,
Acting, Secy-Tres.

February 19, 1919.

Neil Guiney:
Portland, Oregon.

Fellow Worker:

Yours of the 12th inst., at hand and contents noted.

Enclosed you will find copy of resolutions asked for. Have taken the matter up at an informal meeting of the G. E. B. yesterday morning. It has been suggested that they will get out resolutions on the same subject for criminal syndicalism states. In the meantime it would not be a bad idea to have a number of these resolutions put around in a number of halls as they might start in before we expect it.

Yours for Industrial Democracy.

(Signed) P. STONE,
Acting-Secretary Treasurer.

PS—KM. **[213]**

H–49

BULLETIN, Page 3.

WHEREAS—the Industrial Workers of the

World has heretofore published, without editorial comment or adoption, many works on industrial subjects, in which the workers have a natural interest, including treatises on "Sabotage" and

WHEREAS—the industrial interests of the country, bent upon destroying any and all who oppose the wage system by which they have so long exploited the workers of the country, are attempting to make it appear that "Sabotage" means the destruction of property and the commission of violence and that the Industrial Workers of the World favor and advocate such methods, now, therefore, in order that our position on such matters may be more clear and unequivocal, we, the General Executive Board of the Industrial Workers of the World do hereby declare that said organization does not now, and never has believed in or advocated either destruction or violence as a means of accomplishing industrial reform:

First—because no principle was ever settled by such methods.

Second—because industrial history has taught us that when strikers resort to violence, and unlawful methods, all the resources of the Government are immediately aligned against them and they lose their cause.

Third—because such methods destroy the constructive **[214]** impulse, which it is the purpose of this Organization to foster and develop in order that the workers may fit themselves to assume their place in the new society, and we hereby re-affirm our belief in the principles embodied in the report of this body to the Seventh Annual Convention, extracts from

which were re-published under the title, "On the Firing Line."

Francis Miller, C. L. Lambert,
Richard Brazier, G. E. B. Members.

These facts are presented to you for your careful consideration, as the time seems to be approaching when it will be necessary for you to act. Remember that self-preservation is the first law of nature, and your destinies are in your own hands. We cannot allow the life of the Industrial Workers of the World, which has meant so much to all its members, to be crushed out.

With best wishes, I am,

Yours for Industrial Freedom,

WM. D. HAYWOOD,
General Secretary-Treasurer.

WLH—HLS **[215]**

Kristiania, Norway, Nov. 28–18.

Fred Hegge
1001 West Madison St.,
Chicago, Ill.

Fellow Worker & friend

I arived here in good shape and am with good health. We had a fine trip across. I found my sister in this city and am staying with her for the present. I have spoken to a few of our comrades and am going to speak on Friday next week. You can be sure it is a verry inspireing time over here. The only thing which ma— it bad for me is my financial situation. If you could spare a few beans it would sure be appreciated and it would give me more show

to work for our Idea. You may take this up with som of the fellow workers over there. I was clean when I come here did not have a cent. Be sure that things are going fine and dandy. It would be n—— if you could send me some literature of all kinds. I will send you a more news letter latter on. I am going to write to some of the boys at Leavenworth.

With best wishes to you I remain yours for Industrial freedom.

NILS MADSEN.

Nils Madsen
adr Bertrand Pettersen
Bjerregaards gade No. 13 IIII
Kristiania Norway. **[216]**

Boise Ida Jan. 26/1919

Neil Guiney
Fellow Worker

Will drop you a line to acknowledge the receipt of your welcome letter of some time ago.

We are all in good health and spirits at present and enjoying the finest of weather. This time of year generally found us out in the woods with the snow up to our armpits wrestling saw logs, but here the weather is warm and we played baseball yesterday.

The legislative bodies of Idaho are also taking advantage of the warm weather and are busy making more laws among which is one prohibiting the display of the red flag penalty same as the C. S. law, also one creating a state constabulary similar to the one they had in California. They no doubt are tak-

ing their action from the old motto make hay while the sun shines. One of the boise papers carried an article headed Bolshevism vs. Nationalism, a topic that seems to haunt every gathering of the bosses lately. The workers of Russia must have thoroly demonstrated their ability to legislate for themselves in order to cause such a scare in this country.

You no doubt have at sometime attended a game that you were particularly interested in, well that's what it seems like in here, watching the game from the side lines. Notice that everything is carried on broader scale than they formerly were by the workers. At Seattle a few days ago 45000 men walked out as the whistle blew (like the woblies who blow their own whistles) and now there is danger of it spreading to other industries, realizing that in Unity there is strength. [217]

We drew up a resolution dispencing with all legal procedure on our appeals and sent it to Spokane Def com to have it published in the org. papers, let us know if it appeared and send us a clipping of it if you have one handy. Notice that three I. W. W.'s were arrested in St. Maries and are bound over to the federal court we did not get their names also notice that there were a few arrests in Spokane. Well Neil this is all the room I have this time. We unite in sending our greetings to all fellow Workers and wishing you success in your work for the organization.

We remain

Yours for Industrial Freedom

WM. M. NELSON.

What do you think about the chi conference [218]

THE CALL OF THE LUMBER CAMP.

(Tune, "Take Me Back to Old Montana.")

In my little cell I'm longing
For the old camp once again
Where the gong sounds every morning
Where the logs shoot down the main
Where the donkey puffs and thunders
As she drags her heavy load
Hauling down the mighty forest
For the timber holders hoard,

II.

Tis the life that I love dearly
And somehow I long to be
Back among the fir and Pine trees
Where my old friends I can see
Where the big trees kiss the breezes
Where the old time loggers boast
How they stuck for good conditions
From Montana to the coast,

III.

Take me back where I am happy
Where the mountain breezes blow
To the land of hooks and high lines,
Where the trolleys come and go
Where the jacks stand firm to-gether
And the shears no longer trod,
Where they make old fatty shiver
By their action on the job,

IV.

Oh' how well do I remember
How we told fatty dear

Fix your camps up nice and cosy
For the time is almost here
When were going to live like humans
And no longer starve and freeze
There's a brighter day thats dawning,
When exploiting life will cease,

P. S.—I wish you would please try at the book store for a book titled "Spanish at a Glance."

This poem is one which I composed during some of my spare time in this place.

Yours for Ind. freedom,
F. E. H. [219]

Fulton La 2–3–19

Mr. Neil Guiney
Chicago Ill.

Fellow Worker Guiney

I will drop you a few lines and let you know that I am still on deck.

Fellow Worker Graham, and I have been down here, about two months but have not done much organizing so far, it seems hard to get started to do anything among these scissors, but I think if the Union would send good speakers and plenty of organisers down here it would not be long before good results could be obtained, the time is ripe for a general overhauling in this neck of the woods, all it takes is lots of delegates, so when some get grabbed there will be more to take their places.

We have distributed considerable litature, which we brought from Minneapolis, and would kindly ask you to send us the street number of the Minneapolis

Union Hall, as we have not made any remittance yet, but will do so as soon as we know where to send same.

Wages in this district are from $3.00 to $3.50 per day, board is from 85c to $1.15 per day.

Drum pullers and other mechanics receive from $4.50 to $5.20 per day, less board, everything is ten hours, of course. Mill hand wages are from $2.50 per, and up, but not very high up.

If you have a bulletin or other papers I wish you would send us a few as we have not had a word of news since we left Spokane, am sending a few stamps to cover mailing.

Please answer.

Yours for the O. B. W.

J. F. BEAL.

Fulton Louisiana. [220]

County Jail
Portland, Ore. 2–19–19

C. A. Rogers,
City.

Fellow Worker:—

I am being held by the Immigration authorities for "investigation." It looks like deportation to me but we never can tell. I do not know how long I will be here so you had better get busy (if you have not already done so) and get some one in my place.

The officers assure me that they are not holding the stuff in the office so you can have the bookkeeper go to work as if nothing happened. Of course he can use his own judgement about it as I dont want any one to deliberately walk into a trap. I have on deposit $1126.00 in the Hibernian bank and $237.50 in

cash, checks and money orders in the sheriff's office here. Would suggest that you make some arrangements whereby I can turn this money over to the proper person as I do not expect to be on the outside for some time to come. If the immigration people do not want me I think that some other outfit will try to take me over to see what they can do about it. Of course I may be mistaken but I have a habit of always expecting to get the worst of it and in that way I am never disappointed.

I wish you would have some one go to my room and get me a clean suit of underwear and my slippers, tooth brush and paste and a pair of socks. I also have some stationery and stamps which I wish you would send in, so that I will have some decent stationery to write with. Also get me a hard lead pencil and a small bottle of fountain pen ink (blue).

Another thing, do not sent any shysters around here. If I can't spring myself there is no lawyer going to be able [221] to do it for a while anyway. Look after my mail but don't send it in here untill you hear from me again. Anyone visiting me must first get a permit from the Immigration inspector, but I would like to have you let it be known that I am not particular about having anyone run the risk of coming around here asking for me. It is a cinch that whoever does so is going to be trailed by some D. J. man and you know what those birds can do towards dealing any one misery.

Assure the boys that everything is all right and to just go ahead as if nothing ever happened. The mere fact that I am out of the game for a little while

makes no difference in the work of the O. B. U.

They claim that they are now waiting for word from Washington, D. C. about the disposition of my case and that they will know "tomorrow." My experience in these kind of cases tells me that it takes about three weeks for them to make the first move, once they have wrapped the ironworks around a man. However, I am not losing any sleep over it.

Let me know if you get this.

NEIL GUINEY. [222]

U. S. Immigration Station.

Neal Guiney:

Fellow Worker

Yours of the 25 of Jan. received through C. I. C. and it was certainly received with cheer.

Up to date I have not received my notes but believe if they were sent c/o Chamberlain I will receive them at the earliest optunity, as it is very difficult to run the blockade.

Neal something must be doing on the outside as they have made no attempt to start anyone on their way to New York.

We look for the wowder to explode thursday the sixth and you may bet there will be some hell. I live in hopes they will come and take us from here. To tell the truth about the matter, the officials are shaking, in the last week troops we thrown around the buildings of this department. Fourty five 45,000 troops in camp Lewis voted not to take part as strike brakers, it looks good. Neal in reference to the few rags in that suit case. I wish you would take them

if you can use them. As I have no idea what it contains therefore I am willing to call it square. The notes were the only things I realy wanted. It doesn't make much difference if I have one shirt or two.

Up to date I have not received my final orders but believe they are keeping me in the dark so it will be impossible to get the wright to apply for a habeas corpus.

We have a Lawyer in name that about all. The sooner we rid ourselves of these jokes the sooner we are apt to see new things. [223]

Neal I will close for this time hoping to see the final battle. I am Yours for the

REVOLUTION

address

c/o E. I. Chamberlin.

(Note: The above is a copy of what purports to be a letter written from the U. S. Immigration Station at Seattle by Ed Flogaus, a Pole, under order of deportation, to Neil Guiney, Secretary of the Lumber Workers' Industrial Union, No. 500, of the I. W. W., Portland, Oregon.) [224]

Sacramento Bastile,
January 21, 1919.

Neil Guiney.

Fellow Worker:—

Still here yet, but are going to be moved Thursday, so I thought I'd drop you a few lines. Well, hows everything going on. The five sentenced to Frisco County Bastile left this A. M. I wrote you a letter a couple days ago & I wrote it in a hurry so you'll have

to excuse the scribbling, All are well except Fred Esmond & his sick ———. Wasn't expected live through the trial. But he made it O. K. with a severe lecture on top of it. Prostitution didn't think much of themselves after he got through reviewing the frame-up. Say Neil I wish you would put a few adds in the papers there, for Frank Masek. I worked with him in Sky Komish, Washington & want him to drop me a line while in my new home. All are in high hopes here. We new that a capitalist Jury couldn't render any other Verdict than they did.

Also wish you would subscribe for the Defense News Bulletin for me. Delegates have just been here to get the stuff such as Blankets, razors, watches, & that stuff that we can't take along. I also sent you a Sacramento Bee with the names & sentences. Did you receive it? Well I'll close for this time so better wait for a few days before writing. You know my address.

Yours truly forever I remain for the O. B. U. and Industrial freedom.

OTTO ELSNER (?). [225]

B. C. Canada, Feb. 3, 1919.

Neil Guiney
1001 West Madison St
Chicago, Ill.

Fellow Worker:—

Your letter of Dec 18 at hand to day. I see where the authorities turned the cat loose on this letter as they had the seal on it for been open by them. it is hell they cant leave the mail alone in a "Free Coun-

try." Some day they will keep their dirty hands of alright. I have received them due books you sent me. I wrote to Gateway to forward my mail to Virginia, Minn, but I haven got then. I have been laying low for awhile as my wife is not feeling good, but she is feeling better again so I'll go after the slaves again. I'm leaving Canada tomorrow morning for the States. Received a letter from Carter today he said he was going to send in a report last so he most be a delegate for #600 again. I think he is alright again I gave him a good talk last time I was with him. He got a good chance to good for #600 in Whitefish as it is a railroad town. Not what you said about George Franklin going south with $200—How about Fred Hegge I got a letter from Leavenworth Kansas telling he he (unintelligible to be a (unintelligible). Will drop you a line soon as I get back over to the States.

I'm Yours for
INDUSTRIAL FREEDOM
Delegate 366. [226]

B. C. Canada, Feb. 3, 1919

Neil Guiney
1001 West Madison St.
Chicago, Ill.

Fellow Worker:—

Your letter of Dec 18 just at hand today. I see where the authorities turned the cat loose on this letter as they had the seal on it for been open by them it is hell they cant leave the mail alone in a "Free Country." Some day they will keep their dirty hands of alright. I haven received them due books

you sent me. I wrote to Gateway to forward my mail to Virginia, Minn, but I haven got them. I have been laying low for awhile as my wife is not feeling good, but she is feeling better again so I'll go after the slaves again. I'm leaving Canada tomorrow morning for the States. Received a letter from Carter today he said he was going to send in a report last so he most be a delegate for #600 again. I think he is alright again I gave him a good talk last time I was with him. He got a good chance to good work for #600 in Whitefish as it is a railroad town. Not what you said about George Franklin going south with $200—How about Fred Hegge I got a letter from Leavenworth Kansas telling me he (unintelligible) to be a (unintelligible). Will drop you a line soon as I get back over to the States.

I'm yours for
INDUSTRIAL FREEDOM
Delegate 366. [227]

U. S. Immigration Station.

Neal Guiney

Fellow Worker:

Yours of the 25 of Jan received through C. I. C. and it was certainly received with cheer.

Up to date I have not received my notes but I believe if they were sent c/o Chamberlin I will receive them at the earliest optunity, as it is very difficult to run the blockade.

Neal something must be doing on the outside as they have made no attempt to start anyone on their way to New York.

We look for the wowder to explode thursday the sixth and you may bet there will be some hell. I live in hopes they will come and take us from here. To tell the truth about the matter, the officials are shaking, in the last week troops we thrown arround the buildings of this department. Fourty five 45.000 troops in camp Lewis voted not to take part as strike brakers, it looks good. Neal in reference to the few rags in that suit case. I wish you would take them if you can use them. As I have no idea what it contains therefore I am willing to call it square. The notes were the only things I realy wanted. It doesn't make much difference if I have one shirt or two.

Up to date I have not received my final orders but believe they are keeping me in the dark so it will be impossible to get the wright to apply for a habeas corpus.

We have a Lawyer in name that about all. The sooner we rid ourselves of these jokes the sooner we are apt to see new things. Neal, I will close for the time hoping to see the final battle. I am Yours for the

REVOLUTION

address c/o E. I. Chamberlin [228]

Application for Warrant of Arrest Under the Act of Oct. 16, 1918.

U. S. DEPARTMENT OF LABOR.

Immigration Service.

5040/30. Office of Inspector in Charge,
(Place) Portland, Oregon,
February 17th, 1919.

Confirming telegraphic
request of even date.

The undersigned respectfully recommends that the Secretary of Labor issue his warrant for the arrest of NEIL GUINEY, subject of Canada. the alien named in the attached certificate, upon the following facts which the undersigned has carefully investigated, and which, to the best of his knowledge and belief, are true:

(1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the knowledge of the informants.)

That he is affiliated with an organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, etc., etc., or that advocates or teaches the unlawful destruction of property. This alien was formerly field delegate of the I. W. W. of which organization he has been a member three years, and is now secretary of the Lumberworkers' Industrial Union, No. 500, of the I. W. W. In these capacities he has been and is still active

in spreading the pernicious propaganda of this organization, giving all of his time to the work and drawing a salary therefor. He had just arrived in Portland and established his official headquarters when arrested by the local police.

File A.Mc

(2) The present location and occupation of the above-named [229] alien are as follows: City Jail, Portland, Oregon.

Pursuant to Rule 22 of the Immigration Regulations there is attached hereto and made a part hereof the certificate prescribed in subdivision 2 of said Rule, as to the landing or entry of said alien, duly signed by the immigration officer in charge at the port through which said alien entered the United States.

(Signature) R. P. BONHAM,
(Official Title) Inspector in Charge.

W. F. W.

WFW:MAS [230]

WARRANT—ARREST OF ALIEN.

UNITED STATES OF AMERICA.
Department of Labor,
Washington.

No. 54616/70.

To R. P. Bonham, Inspector in Charge, Portland, Oregon, or to any Immigrant Inspector in the Service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien NEAL GUINEY, who landed at an unknown port, on or about the 1st day of Jan., 1918, has been found in the United States in viola-

tion of the immigration act of February 5, 1917, for the following among other reasons:

That he has been found advocating or teaching the unlawful destruction of property.

I, JOHN W. ABERCROMBIE, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1919." Pending further proceedings the alien may be released from custody upon furnishing satisfactory bond in the sum of $2,000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 18th day of February,1919.

(Exact copy as signed by John W. Abercrombie Mailed 2, 1919, by B.)

Acting Secretary of Labor.

RM:ETH. [231]

54616/70

February 18, 1919.

Immigration Service,

Portland, Oregon,

Arrow Neal Guiney, destructionist. Relay twenty.

Exact copy as signed by John W. Abercrombie Mailed 2, 1919, by B.

Acting Secretary.

RM.

ETH. [232]

DEPARTMENT OF LABOR.
TELEGRAM.

Portland Ore Feb 17–19

Immigration Bureau,
Washington, (DC)

Wadding NEAL GUINEY destructionist relegate twenty.

BONHAM.

930am.
Feb 19–19.

2/18 10:15
Expedite to Cor. Sec.
WW.

Filed June 30, 1919. G. H. Marsh, Clerk. [233]

AND AFTERWARDS, to wit, on the 19th day of July, 1919, there was duly filed in said court an Opinion, in words and figures as follows, to wit: [234]

In the District Court of the United States for the District of Oregon.

In the Matter of the Application of NEIL GUINEY for Writ of Habeas Corpus.

Opinion.

BERT E. HANEY, United States Attorney,

BARNETT H. GOLDSTEIN, Assistant U. S. Attorney.

GEORGE F. VANDERVEER, for Petitioner.

WOLVERTON, District Judge (Orally):

Neil Guiney is being held by the Immigration In-

spector in charge of the Portland office for deportation to Canada. The charge against him is that he has been found advocating or teaching the unlawful destruction of property. He insists, through his counsel, that the record of his examination before the acting inspector in charge contains no evidence sufficient to substantiate the charge, and, further, that the findings of the Commissioner General appear to have been based upon extraneous matter not properly incorporated in the record.

From a careful review of the testimony, it appears that the petitioner is a member and secretary of the Lumber Workers' Industrial Union of the I. W. W. whose duties were to supervise the work of the organization and superintend the distribution of I. W. W. literature among its members. He avows sympathy with the organization "to a large extent," and, "as a whole, with the object and aims of the I. W. W. as set forth in its preamble and much of its literature," he is in thorough accord. Without denying that the I. W. W. is a revolutionary organization, that it aims to use any and all tactics that will get the results with the least expenditure of time and energy, and that the question of right and wrong does not concern its members, he seeks to explain that "any and all tactics" does not necessarily mean destruction or overthrow [**235**] of government or assassination, but he makes no effort to define the application of the phrase as understood in the order. And so of the words "right" and "wrong," he seems to think they are relative terms merely, but insists in effect that his order is the sole judge of their application, re-

gardless of how it may affect the employer class. He denies that he believed in sabotage, or that the order indorses its use. The literature promulgated by the organization undoubtedly advocates its use, and it is so shown by the record. The attempt is to deny official responsibility, while nevertheless the practice is resorted to freely by the members of the order.

Guiney's argument in palliation of his acts is that he absorbed his radical ideas in this country, and, having done so, that this government ought not to deport him. His entire statement is largely evasive, and his deductions are illogical. There can be no question that the record supports the findings of the Commissioner General.

As to the other criticism, the Commissioner General, in transmitting the record here for the purposes of this trial, has attached thereto the correspondence pertaining to the inquiry, which is not properly a part of the record, and cannot be so considered. Obviously it had no influence with the Commissioner General; nor should it be considered here.

The writ will be discharged, and the petitioner will be allowed twenty days in which to determine whether he will prosecute an appeal.

Filed July 19, 1919. G. H. Marsh, Clerk. [236]

AND AFTERWARDS, to wit, on Monday, the 21st day of July, 1919, the same being the 13th Judicial day of the Regular July term of said Court—Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [237]

In the District Court of the United States for the District of Oregon.

No. 8457.

In the Matter of the Application of NEIL GUINEY for a Writ of Habeas Corpus and Ancillary Writ of Certiorari.

Order Denying Petition for Writ of Error.

The above-entitled matter having come duly on for hearing on the 30th day of June, 1919, before Honorable Charles E. Wolverton, one of the Judges of the above-entitled court, pursuant to an order made on the 23d day of June, 1919, by Honorable Robert S. Bean, the Judge of the above-entitled court before whom said writ was made returnable, continuing said hearing to said date; the petitioner being present in person and represented by George F. Vanderveer, his attorney; the respondent appearing in person and by Barnett H. Goldstein, one of his attorneys, and the Court having duly considered the complaint of the petitioner, the order directing the issuance of a writ of habeas corpus and an ancillary writ of certiorari, the writ and ancillary writ issued pursuant thereto, the answer and return of the re-

spondent filed herein on June 30, 1919, and the transcript of the record of the proceedings of the United States Department of Labor, certified by A. Caminetti, Commissioner General of Immigration for the United States, which transcript was filed with and made a part of the respondent's said answer and return; the Court having heard the arguments of counsel and being fully advised in the premises and having on the 19th day of July, 1919, filed herein a written opinion and decision discharging the writ of habeas corpus herein; now, upon motion of Barnett H. Goldstein, one of the attorneys for the respondent, it is, for the reasons more particularly recited in said written opinion and decision: [238]

ORDERED, ADJUDGED AND DECREED that the writ of habeas corpus issued herein on the 13th day of June, 1919, be, and the same hereby is discharged and the petitioner is hereby remanded to the custody of the respondent under the warrant of deportation made by John W. Abercrombie, Acting Secretary of Labor, made the 27th day of May, 1919.

To the foregoing order, and each and every part thereof, the petitioner duly and regularly excepted at the time of the signing of said order, and his exception is hereby allowed.

Done in open court this 21st day of July, 1919.

CHAS. E. WOLVERTON,

Judge.

Filed July 21, 1919. G. H. Marsh, Clerk. [239]

AND AFTERWARDS, to wit, on the 22d day of July, 1919, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [240]

In the District Court of the United States for the District of Oregon.

In the Matter of the Application of NEIL GUINEY for a Writ of Habeas Corpus and Ancillary Writ of Certiorari.

Petition for Appeal and Order Allowing Same.

To the Honorable CHARLES E. WOLVERTON, District Judge:

The above-named petitioner, feeling aggrieved by the order and decree rendered and entered in the above-entitled cause on the 21st day of July, 1919, does hereby appeal from said decree to the Circuit Court of Appeals for the 9th Circuit, for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 9th Circuit, sitting at San Francisco, under the rules of such court in such cases made and provided.

(Signed) NEIL GUINEY,
Petitioner.

(Signed) RALPH S. PIERCE AND
GEORGE F. VANDERVEER,
Attorneys for Petitioner.

On this 22d day of July, 1919, it is ORDERED that the appeal be allowed as prayed for and that bond for costs on such appeal be fixed in the sum of $250.

(Signed) CHAS. E. WOLVERTON,
District Judge.

Filed Jul. 22, 1919. G. H. Marsh, Clerk. [241]

AND AFTERWARDS, to wit, on the 22d day of July, 1919, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [242]

In the District Court of the United States, for the District of Oregon.

In the Matter of the Application of NEIL GUINEY for a Writ of Habeas Corpus and Ancillary Writ of Certiorari.

Assignments of Error.

Now comes the petitioner in the above-entitled cause and files the following assignments of error upon which he will rely upon the prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 21st day of July, 1919.

ASSIGNMENT No. 1.

Said District Court erred in rendering and entering the order and judgment of July 21st, 1919, herein appealed from, discharging the writ of habeas corpus herein and remanding the petitioner to the custody of the respondent, on the ground and for the reason that the order and warrant of deportation

made and issued by the United States Secretary of Labor on the 27th day of May, 1919, wherein he found the petitioner had been found within the United States advocating the destruction of property and wherein he ordered said petitioner deported to the Dominion of Canada, was and is wholly arbitrary and void for each and all of the following reasons:

First. Because at the time the warrant of arrest was issued by said Secretary of Labor on to wit: the 18th day of February, 1919, and at the time said order and warrant of deportation was made, on, to wit, May 27th, 1919, more than five years had expired since the petitioner's entry into the [243] United States on to wit: March 1st, 1913.

Second. At the hearings held to inquire into said matter no evidence was produced that the petitioner had ever advocated, or ever been found advocating, the unlawful destruction of property, and

Third. Because the hearings held to inquire into the charges filed against the petitioner were not conducted in accordance with the forms and processes of law, in that the evidence was submitted to and considered by the United States Secretary of Labor in the absence of and without the knowledge of petitioner and which he had no opportunity to examine, explain or rebut.

ASSIGNMENT No. 2.

Said District Court erred in finding that the petitioner had ever advocated, or been found within the United States advocating, the unlawful destruction

of property, for the reason that there was and is no evidence to sustain such a finding.

ASSIGNMENT No. 3.

Said District Court erred in finding that the correspondence incorporated in the original file constituting the record of the Bureau of Immigration in the case of the alien Neil Guiney, the petitioner, which had been introduced in evidence against the petitioner in his absence and without his knowledge, and which he had had no opportunity to examine, explain or rebut, had had no influence with the Commissioner General of Immigration or the Secretary of Labor in considering and determining said case, for the reason that there was and is no evidence to sustain such finding and the same is contrary to [244] and refuted by the certificate attached to said file by said Commissioner General of Immigration and the Acting Secretary of Labor.

WHEREFORE, the petitioner prays that said decree be reversed and that said District Court be ordered to enter a decree discharging the petitioner from further custody.

NEIL GUINEY,
Petitioner.

RALPH S. PIERCE and
GEORGE F. VANDERVEER,
Attorneys for Petitioner.

Filed Jul. 22, 1919. G. H. Marsh, Clerk. [245]

AND AFTERWARDS, to wit, on Tuesday, the 22d day of July, 1919, the same being the 14th judicial day of the Regular July term of said court—Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [246]

In the District Court of the United States for the District of Oregon.

No. 8457.

In the Matter of the Application of NEIL GUINEY for a Writ of Habeas Corpus and Ancillary Writ of Certiorari.

Order Denying Application for Bail.

The petitioner in the above-entitled matter having, on the 22d day of July, 1919, by his counsel, George F. Vanderveer, at the time of filing and presenting his petition for appeal and assignments of error, applied for an order retaining custody of the appellant in the court and enlarging him on bond to be fixed by the Court, it is

ORDERED that said application be, and the same hereby is, denied and that application for bail be made to the United States Secretary of Labor; and it is further ordered that all further proceedings under the warrant of deportation made by the Secretary of Labor be staid, pending the determination of the appeal herein.

Done in open court this 22d day of July, 1919.

CHAS. E. WOLVERTON,
Judge.

Filed July 22, 1919. G. H. Marsh, Clerk. [247]

AND AFTERWARDS, to wit, on the 23d day of July, 1919, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [248]

Portland, Ore., No. 70,674.
J. L. HARTMAN COMPANY, Gen. Agts.

In the District Court of the United States for the District of Oregon.

In the Matter of the Application of NEIL GUINEY for a Writ of Habeas Corpus and Ancillary Writ of Certiorari.

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, Neil Guiney, as principal, and The United States Fidelity and Guaranty Company, a surety corporation organized under the laws of the State of Maryland, are held and firmly bound unto R. P. Bonham, the respondent herein, in the full and just sum of Two Hundred and fifty ($250.00) Dollars, to be paid to the said R. P. Bonham, his heirs, executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 23d day of July, in the year of our Lord, one thousand nine hundred and nineteen.

WHEREAS, lately, on the 21st day of July, 1919, in a suit depending in said Court, wherein the above-named principal was complainant and the said R. P. Bonham was respondent, judgment was rendered against the complainant, discharging a writ of habeas corpus and remanding him to the custody of the respondent; and,

WHEREAS, on the 22d day of July, 1919, said complainant duly appealed from said judgment to the Circuit Court of [249] Appeals of the United States for the 9th Circuit, which appeal was on said date duly allowed by the Honorable Charles E. Wolverton, one of the Judges of the above-entitled court, and on the 23d day of July, 1919, in pursuance thereof, a citation was issued out of said court, directing the respondent, R. P. Bonham, to appear in said United States Circuit Court of Appeals for the 9th Circuit on the 20th day of August, 1919, to show cause, if any there be, why said judgment should not be corrected:

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said complainant, appellant, shall prosecute his said appeal to effect and answer all costs that may be awarded against him therein, then this obligation shall be null, void and of no effect, otherwise to be and remain in full force and virtue.

IN WITNESS WHEREOF, the above-named principal has hereunto set his hand and seal, and

the above-named surety has caused these presents to be executed in its name and under its seal by its duly authorized attorney-in-fact, the day and year first above written.

(Signed) NEIL GUINEY. (Seal)
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By H. WESTENFELDER,
Its Attorney-in-Fact.

Approved this 23d day of July, 1919.
(Signed) CHAS E. WOLVERTON,
District Judge.

Filed Jul. 23, 1919. G. H. Marsh, Clerk. [250]

AND AFTERWARDS, to wit, on the 23d day of July, 1919, there was duly filed in said court, a praecipe for transcript, in words and figures as follows, to wit: [251]

In the United States District Court for the District of Oregon.

In the Matter of the Application of NEIL GUINEY for a Writ of Habeas Corpus.

Praecipe for Transcript of Record on Appeal.

To the Clerk of the Above-entitled Court:

You will please prepare and certify as required a transcript of record on appeal embracing the following papers on file therein:

1. Complaint.
2. Order directing issuance of writ.

3. Writ and return.
4. Answer and return to writ.
5. Transcript of record certified by Caminetti and filed with said answer and return.
6. Opinion and decision.
7. Judgment discharging writ.
8. Order denying bail.
9. Petition for appeal.
10. Order allowing appeal.
11. Assignments of error.
12. Citation on appeal.
13. Cost bond on appeal and order approving same.

GEORGE F. VANDERVEER,
Atty. for Complainant, Appellant.

Filed July 23, 1919. G. H. Marsh, Clerk. [252]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing pages numbered from 2 to 252, inclusive, constitute the transcript of record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final order of the District Court of the United States for the District of Oregon, in the matter of the petition of Neil Guiney for a writ of habeas corpus, wherein the said Neil Guiney is appellant and R. P. Bonham is respon-

dent; and that said transcript is a full, true, and complete transcript of the record and proceedings had in said court in said cause as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is $73.95, and that the same has been paid by the said appellant.

In testimony whereof, I have *hereunto my* hand and caused the seal of said court to be affixed, at Portland, in said district, this 25th day of August, 1919.

[Seal] G. H. MARSH,
Clerk. [253]

[Endorsed]: No. 3384. United States Circuit Court of Appeals for the Ninth Circuit. Neil Guiney, Appellant, vs. R. P. Bonham, as United States Inspector in Charge of Immigration for the District of Oregon, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed August 27, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NEIL GUINEY,
Plaintiff,

vs.

R. P. BONHAM, as United States Inspector in charge of Immigration for the District of Oregon,
Appellee.

No. 3384.

APPELLANT'S BRIEF.

Upon Appeal from the United States District Court for the District of Oregon.

GEORGE F. VANDERVEER, *and*
RALPH S. PIERCE,
Attorneys for Appellant.

Office and Post Office Address:
607 Central Building,
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STATEMENT OF THE CASE.

(Unless otherwise noted, italics wherever employed in this brief are our own.)

This is an appeal from an order of the United States District Court for the District of Oregon discharging a writ of habeas corpus and ancillary writ of certiorari, and remanding the appellant to the custody of the appellee under a warrant of deportation made by the United States Department of Labor on the 27th day of May, 1919.

The appellant was born in Lillooet, B. C., on the 31st day of February, 1890, where he lived until about ten years of age, and then moved to Sudbury, Ontario. At the age of about fourteen he went to work in the woods. Since that time he has followed logging as his principal occupation, sometimes working for short periods in the harvest fields or on construction work. It appears that on at least two occasions prior to 1913 he entered the United States in pursuit of work and returned later to Canada (See pp. 255 to 257, Transcript). His last entry into the United States was in February or March of 1913 (p. 257, Transcript), at which time he was questioned by an United States Immigration Inspector in the usual

manner (p. 258, Transcript). On October 7, 1916, he became a member of the Industrial Workers of the World, in which organization, at various times in 1917, he held office as Stationary Delegate, Branch Secretary, and Traveling Delegate (p. 259, Transcript). In the latter part of September, 1918, he became Secretary of Lumbers Workers Industrial Union, a branch of the Industrial Workers of the World with about 35,000 members in the United States and Canada (pp. 259-260, Transcript); and on the 10th or 11th day of February, 1919, he went to the city of Portland to open an office for said union. He had just opened this office when, merely because he was an I. W. W. official (p. 250, Transcript), he was arrested by the Portland city police (p. 260, Transcript)

On the 18th day of February, 1919, on the application of the appellee, unsupported by any showing, the Department of Labor issued its warrant of arrest, wherein it charged that the appellant had "been found advocating or teaching the unlawful destruction of property" "in violation of the Immigration Act of February 5, 1917" (p. 20, Transcript). He was taken into custody on this warrant and granted three hearings on said charge before W. F. Watkins, a United States Immigration Inspector at Portland, Oregon (pp. 14, 15, Transcript). The first hearing was held at the office of the Inspector in Charge, Portland, Oregon, on February 20, 1919 (p. 254, Transcript),

and at this hearing seventeen and one-half pages of testimony were taken (pp. 255, 272, Transcript). The second hearing was held in the Multnomah County jail at Portland, Oregon, on March 14, 1919 (p. 272, Transcript), at which time four and one-half printed pages of testimony were taken (pp. 272 to 276, Transcript). The third hearing was held in the office of the Inspector in Charge, Portland, Oregon, on May 10, 1919, at which time two printed pages of testimony were taken (pp. 32 and 33, Transcript). In all, twenty-four printed pages of testimony were taken, exclusive of exhibits. After fifteen pages of this testimony had been taken (more than three-fifths of the whole) appellant was informed for the first time of his right to counsel (p. 270, Transcript).

The case was heard before the District Court without evidence, on the petition for the writ and the respondent's return thereto supplemented by "the original file constituting the record of the Bureau of Immigration, Washington, D. C., in the case of the alien Neil (or Neal) Guiney", duly certified by both the Commissioner General of Immigration and the Acting Secretary of Labor (pp. 3 to 301, inc., of Transcript). Included in this file are the testimony and exhibits which were offered in evidence, also a great many letters and other papers, to which we will refer to more particularly hereafter, and which were never identified under oath and never submitted to appel-

lant, but were introduced into the record ex parte and without his knowledge. Many of these are copies of letters written either to or by the alien during his confinement in jail, and which were opened, examined and copied without any authority in law and without his knowledge or consent. Some were entirely harmless, others were very damaging to his case. All these were sent to the Bureau of Immigration with various caustic comments, by either the appellee or Inspector Watkins, where they were incorporated in the record, as attested by the certificates above referred to, and, we believe, entered into the findings of the Commissioner. A report to the Acting Chief of the Bureau of Investigation by the Department of Justice was introduced in this same ex parte fashion. It contains at least two very damaging statements which are not only absolutely false in facts but directly contrary to the evidence as well (pp. 244, 245, Transcript).

The Assignments of Error (pp. 307-309, Transcript) present three questions which we will discuss under the following points:

I. The appellant did not have a fair hearing.

II. The finding that appellant had ever "been found advocating or teaching the unlawful destruction of property" is not supported by the evidence and was a clear abuse of the Secretary's discretion.

III. Deportation under Section 19 of the Act of February 5, 1917, is barred after five years

from the alien's last entry into the United States.

POINT I.

THE ALIEN DID NOT HAVE A FAIR HEARING, CONDUCTED IN ACCORDANCE WITH THE FORMS AND PROCESSES OF LAW, because:

1. He was at no time represented by an attorney, nor was he informed of his right to counsel until more than three-fifths of the testimony had been taken, at which time he was told, "You are entitled to the privilege of counsel in this hearing who may be present *from this time on* to represent you" (p. 270, Transcript). There is no direct evidence in the record that appellant's right to counsel had previously been directly denied; on the contrary, the record is entirely silent on the subject. The phrase in italics indicates to us, however, that the withholding of this information was intentional on the part of the Inspector. Under any circumstances the appellant had a right to be informed of this privilege at the beginning of his hearing.

In *Ex parte Plastino*, 236 Fed. R. (D. C.) 295, at 297, the Court said:

> "It was the right of the accused to be advised of the privilege of counsel before he was examined and it is admitted that this information, if given, was not given until the examination was concluded."

2. The second hearing was conducted in jail.

Only four and one-half printed pages of testimony were taken at this hearing, but eleven exhibits all told, six letters and five stickers, were identified and introduced in evidence; and at this hearing the appellant was cross-examined in a more inquisitorial spirit than at any other time during the entire proceeding. This manner of conducting a judicial, or even a quasi-judicial, inquiry savors more of the inquisition than the "forms of law".

3. The record discloses eleven letters (pp. 228, 230, 231, 233, 234, 238, 242, 243, 248, 283 and 286, Transcript) which were introduced in exidence ex parte and without the appellant's knowledge. There is no question about this. The first five enumerated were undoubtedly enclosed in Inspector Watkins' letter to the Bureau of May 10 (p. 30, Transcript). The next three in order of enumeration were undoubtedly enclosed in the appellee's letter to the Bureau of April 14 (pp. 237 and 238, Transcript). The letter on page 248 of the Transcript was enclosed in Inspector Watkins' letter of March 21 (p. 247, Transcript). It is impossible to determine definitely just when or how the last two were sent to the Bureau. Two of these letters purport to have been written by appellant. Eight are unanswered letters purporting to have been written to him, and the remaining one was between strangers. In Inspector

Watkins' letter of March 6 (pp. 250 to 253, Transcript), referred to with approval by the appellee as a "comprehensive report" (p. 249, Transcript), the inspector writes:

> "I have included with the record *some* letters from certain of Guiney's personal friends now serving sentences for violation of the Espionage Law, criminal syndicalism, etc., as showing the character of his associates in the I. W. W."

At this time only two letters were in existence to which this could refer, the letter of Otto Elsner (pp. 293 and 294, Transcript), which was identified, and the letter of Wm. M. Nelson (pp. 286, 287, Transcript), which was introduced ex parte.

Much more damaging even than these, however, is the Department of Justice report entitled, "Alien for Deportation" (pp. 245, 246, Transcript), which was sent to the Law Examiner of the Bureau of Immigration by the Acting Chief of the Bureau of Investigation of the Department of Justice (pp. 244, 245, Transcript). This report refers to the appellant as an "anarchist" and charges that he was "convicted and in prison, Idaho State Penitentiary, Winter or Spring, 1917-1918". Both of these statements are not only absolutely false but proven to be so by the undisputed testimony of the alien that he was not an anarchist (pp. 261, 262 and 270, Transcript), that he was acquitted of a charge of criminal syndicalism at St. Maries, Idaho, and was never ar-

rested on any other occasion (p. 269, Transcript). The notations on this letter indicate that it was received by the Bureau of Immigration on April 9, 1919, and referred to the law section for *appropriate action* and reply; and presumably by them introduced into the record. At this time the record in the proceeding which proved the falsehood of both these statements had been in the hands of the Bureau over thirty days (appellee's letter of March 6, p. 249, Transcript) and presumably had passed through Mr. McClelland's own hands (See note p. 27, Transcript).

In *Chew Hoy Quang v. White,* 249 Fed. 869, at 870, this Court said of such a proceeding:

> "Aside from that we hold that the fact that the Immigration authorities received a confidential communication concerning the applicant's right to admission, upon which they acted, and which was forwarded to the Department of Labor for its consideration, was sufficient to constitute the hearing unfair. However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, there clearly is no warrant for basing decision, in whole or in part, on confidential communications, the source, motive, or contents of which are not disclosed to the applicant or her counsel, and where no opportunity is afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received."

See also:

McDonald v. Sin Tak San, 225 Fed. (C. C. A. 8 Cir.) 710, 713;

In re Chan Too Lin, 243 Fed. (C. C. A. 6 Cir.) 137, 141;

Ex parte Petkos, 212 Fed. 275.

The ex parte attempt to impeach appellant's character by unproven and unanswered letters from his "personal friends now serving sentences for violation of the Espionage Law, criminal syndicalism, etc.," was bad enough under any circumstances. Embodied, as this was, in the "comprehensive report" of a quasi-judicial officer, it becomes intolerable. But bad as this was, the ex parte introduction of the Department of Justice report by another quasi-judicial officer was much worse. The statements in this report that appellant was an anarchist and a convicted felon would *per se* sustain either a civil suit or a prosecution for libel. Malice would be implied. Can it be said that a proceeding characterized by such methods is in accordance with the forms and processes of law? We would prefer, if possible, to attribute this to ignorance, but the man who introduced it into the record was a "law examiner" and presumably a lawyer.

4. Nine of the letters above referred to were purloined from appellant's mail, without his knowledge and without any authority in law, while he was a prisoner in the county jail in appellee's

custody. Another letter, a copy of which appears on page 289, Transcript, and a newspaper clipping, a copy of which appears on page 278, Transcript, were obtained in the same unauthorized manner while he was a prisoner, but probably not taken from the mails. At page 31 of the Transcript Inspector Watkins refers to these letters as "communications *passing between* this alien, who is confined in the county jail here, and other 'fellow workers' of the I. W. W." At page 237, Transcript, the appellee refers to another of them as "copy of a letter *the alien has just written* to one Fred Hegge," etc., and at page 247, Transcript, Inspector Watkins refers to another as a "copy of a letter *just received this morning* addressed to Neil Guiney." Every one of these references points unmistakably to the fact that the letters in question were in some manner intercepted in their transit through the mails. It is significant in this connection that not a single one of the letters transmitting them to the Deparment contains any reference to the enclosures in language such as one would usually employ in referring to letters received through the ordinary channels. It is still more significant that none of these letters was exhibited to the appellant for identification. Why not?

That these letters were protected by the provisions of Article IV of the Amendment to the Constitution of the United States is squarely de-

cided by the Supreme Court in *Ex Parte Jackson,* 96 U. S. 727, at 733. Their use as evidence against him was a clear invasion of the appellant's constitutional rights and any judgment so founded is void. See *Tsuie Shee, et al. vs. Backus,* 243 Fed. 551, 553, decided by this Court, and *Weeks v. U. S.,* 232 U. S. 383.

It may be suggested that the appellant should have made a demand for the return of these letters, but how could he when he did not know they were in the Department's hands until they appeared in their return to the writ of habeas corpus? We realize that this was not strictly a criminal proceeding, but in the Weeks case, *supra,* the Supreme Court held that *both* the seizure and the admission in evidence of such letters constituted reversible error. We do not rely principally on the Fifth Amendment, although we believe its provisions should apply in a proceeding involving such a deprivation of personal liberties. It is clear that the Fourth Amendment applies equally to all persons and in all proceedings. In this case there has been a clear invasion of appellant's rights under this Amendment, committed, as the record clearly shows, deliberately and for the express purpose of securing evidence against him. If the United States Constitution means anything, a judgment founded upon such evidence is absolutely void.

5. The entire deportation proceeding was con-

ducted, and all the evidence weighed, in a spirit of such hostility to the alien as to make a fair hearing impossible.

On March 6, 1919, Inspector Watkins, in the discharge of his judiciary duties, forwarded the record in the deportation proceedings to the appellee (p. 250, Transcript), who in turn on the same day forwarded the same to the Commissioner General of Immigration (p. 249, Transcript). In this latter letter the former is referred to as a "comprehensive report". We quote the following passages as indicating the spirit in which the investigation was conducted and the "report" made by Inspector Watkins:

> "The notorious and unlawful practices for which this organization has been responsible through its members, and which it has openly advocated are so well known and numerous as to hardly require any extended comment. It is a well-established fact, *I believe*, that the I. W. W. has long advocated 'direct action', sabotage, destruction of property if necessary, and various other means of gaining the objects sought. In the well-known case of the United States vs. Swelgin, Federal Judge Wolverton of this District held, in effect, some time since that the I. W. W. is 'an anarchistic organization opposed to all forms of government, advocating lawlessness, owing no allegiance to any organized government, and that its adherents are anti-patriotic.' The alien, Guiney, is not merely a member of the I. W. W.; he holds an important office in the organization, being Secretary of the Lumber Workers' Industrial Union, No. 500 (having a mem-

bership of about 35,000), is a very intelligent individual, and, of course, thoroughly understands the workings of the organization, though clever enough to deny that its teachings come within the prohibition of law. In support of his claim that the I. W. W. does not advocate the unlawful destruction of property, the alien has submitted a resolution denying such advocacy, which is signed by Wm. D. Haywood. This is the same Haywood who, with about one hundred other I. W. W. members, was recently convicted at Chicago of violation of the Espionage Law. I have included with the record some letters from certain of Guiney's personal friends now serving sentences for violation of the Espionage Law, criminal syndicalism, etc., as showing the character of his associates in the I. W. W. Guiney *admits* his own arrest and prosecution in the State of Idaho on the charge of criminal syndicalism, but *claims* that, after spending four months in jail awaiting trial, he was finally acquitted by the jury.

This alien, as an officer of the I. W. W., has had a very active part in the spreading of its propaganda, and in the distribution of its literature, and has been very instrumental in furthering its principles and doctrines. His anti-patriotism is proved by his failure to return to Canada to enlist himself with the Military Forces of his native country, and claiming exemption on this side of the line by reason of being an alien, thereby securing exemption from service in the U. S. Army. Guiney alleges that he has purchased no Liberty Bonds or otherwise supported this Government in the war in a financial way, although admitting that he has no dependents. I believe that the charges against this alien have been fully substantiated, and therefore

> desire to strongly recommend his deportation to Canada, the country of his nativity and of which he is still a subject."

All of the observations about the "notorious and unlawful practices" of the I. W. W., about Judge Wolverton's findings in the Swelgin case, about Haywood and the other members convicted in Chicago, and about the enclosed letters "from certain of Guiney's personal friends now serving sentences for violation of the Espionage Law, criminal syndicalism, etc., as showing the character of his associates in the I. W. W.", at least one of which was stolen from his mail and introduced into the record ex parte, all these are not only entirely unsupported by any evidence but are also entirely foreign to any issue in this case. The slurring statements that "Guiney" (not dignified by any style of address) "*admits* his own arrest and prosecution", etc., "*but claims* that * * * he was finally acquitted by a jury", is a contemptible attempt ot impeach a fact uncontradicted in the record (p. 269, Transcript). The comments on appellant's claim of exemption from military service, while sustained in the record, are also entirely beside any issue in the case, as, indeed, is Exhibit H-43 (pp. 278 to 272, Transcript). All such remarks, especially when couched in the bitter language of this letter, indicate a degree of hostility absolutely fatal to a judicial inquiry. They can have, and we there-

fore allege they are purposely designed to have, only one effect, namely, to excite the bitterest prejudice against this man on trial.

From the appellee's letter enclosing the foregoing we quote the following:

> "Neil Guiney is one of the most active and dangerous exponents of the doctrines of the Industrial Workers of the World with whom we have come in contact. He is not only subject to deportation under the Act of October, 1918, as being a member of an organization teaching the unlawful destruction of property and the overthrow of our Government and institutions, but by his prominent connection and leadership in the I. W. W. he has most certainly taught and advocated these doctrines as an individual. His arrest, because of his leadership in the organization, was very disconcerting to them, and interfered to a considerable extent with the spreading of their pernicious propaganda in the Northwest. His deportation would tend to have salutary effect, and is much to be desired."

The charge that "Neil Guiney *is* one of the most active and dangerous exponents of the doctrines of the I. W. W. with whom *we* have come in contact" is not only unsupported by any evidence but clearly negatived by the evidence, which we shall consider later under Point II of the brief. The two concluding sentences invoking an order of deportation as a means of stopping the activities of the I. W. W. organization amount to a plain confession of the motives which prompted the initial arrest and of the spirit in which the

whole proceeding was conducted to the end. Both these gentlemen entered upon the discharge of their judicial duties with the rope already cut.

Notwithstanding all these importunities the Department was evidently unable to find any evidence in the record upon which to base a warrant of deportation, so on May 5, 1919, it requested the appellee to again question the appellant "thoroughly" regarding his distribution of certain literature, in which connection it stated, "It is probable that he may have distributed the book entitled, 'I. W. W. Songs to Fan the Flames of Discontent,' and this fact should be ascertained. The distribution of this book is sufficient to establish the charge of teaching and advocating the unlawful destruction of property" (p. 236, Transcript). Again the case is absolutely pre-judged. Without any reference to the circumstances under which the book might have been circulated, without any reference to appellant's knowledge or ignorance of its contents, "the distribution of this book" is declared to be sufficient to sustain the charge. The appellee and Inspector Watkins evidently had not wasted their invectives and importunities. The inquisatorial spirit in which they had conducted their part of the proceedings was at last implanted in the Bureau itself.

On May 10th Inspector Watkins transmitted to the Bureau the evidence taken at the Bureau's special request, and with it he forwarded five

more letters purloined from the appellant's mail. In this letter also he refers to the song book which it had been the special purpose of the hearing to identify, as follows:

> "The further circulation of the publication, after he became Secretary of the Union, being interrupted, *because of their supply having become exhausted.*"

That this was a deliberate misstatement is proven by the record which was enclosed in the same letter:

> "The book was out of print when I became Headquarters Secretary for Union 500 of the I. W. W. I distributed that book prior to that time as Stationary Delegate of Lumber Workers' Union of the I. W. W. when I was at St. Marys, Idaho. This is an old edition. There is a later edition of the Song Book published by the General Office entitled, 'General Defense League'" (p. 33, Transcript).

From the notation which appears in the middle of page 27 of the Transcript, we infer that it is the duty of a law examiner in the Bureau of Immigration to check over the proceedings and see that the forms and requirements of law have been complied with. At least Mr. H. McClelland did so certify in this case. Near the top of page 272 of the Transcript, following some of appellant's testimony, appears the following note:

> "(Note: It is noted that a number of I. W. W.'s recently arrested at Portland are

making the same plea. Evidently they have had a rehearsal.—H.MC.)"

Mr. McClelland's are the only initials which we can find in the entire record with which these correspond. It would be humorous if it were not so serious, that in one breath the "Law Examiner" should certify that the record is "correct as to form and procedure" and in the next go entirely outside the record to find material for an insulting comment on the appellant's testimony. And when we remember that this is the gentleman who incorporated into the record the libelous Department of Justice report, entitled 'Alien for deportation", we wonder where the Law Examiner borrowed his ideas of "correct procedure". Surely not from the Fourteenth Amendment to the Constitution.

It has been seemingly impossible to untangle the mess of irregularities presented in this record, and discuss them in any orderly arrangement in this brief. All that has been said under the four preceding sub-heads has a direct bearing upon this matter of the Department's hostility to the appellant. The deprivation of counsel, the act of conducting an inquisitorial hearing in jail, the rifling of appellant's mail and personal effects, and the ex parte introduction of documents in evidence, all these are not only distinct invasions of his natural rights but bear eloquent evidence, as well, of the hostility with which his judges treated him during the entire proceeding. A scrupulous

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to the mandate of a writ of certiorari, the Assistant Secretary of Labor says "This certificate is entitled to full faith and credit". In that same spirit the appellee made this "record" a part of his return to that writ and tendered it to the Court. Can he be heard now to deny it?

POINT II.

THE FINDING THAT THE APPELLANT WAS GUILTY AS CHARGED IN THE WARRANT IS CONTRARY TO THE "INDISPUTABLE CHARACTER OF THE EVIDENCE", INVOLVES A CLEAR ABUSE OF DISCRETION AND IS VOID.

The principles governing the courts in reviewing the findings and decisions of administrative or quasi-judicial officers have been so often declared by this Court, and are so clearly settled, that in our opinion it would be only a waste of the Court's time and our own to enter upon a detailed examination of the decisions. It is perfectly clear on the one hand that the Court will not review the evidence for the purpose of determining how it preponderates. Neither, on the other hand, is it sufficient that the findings may be sustained by a scintilla of evidence. Jurisdiction is the power to hear and determine, and any valid exercise of jurisdiction involves not only a *hearing* conducted in accordance with the forms of law, but a

determination based upon the evidence. An arbitrary decision which ignores or is contrary to "the undisputable character of the evidence" is not such a determination and is uniformly held to be void. The phrase quoted is taken from the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Whitfield, et al. v. Hanges, et al.*, 222 Fed. 745, at 751, which has often been cited with approval of this Court. Let us examine the evidence in this case in the light of these principles.

The charge made against the appellant in the warrant of arrest is "that he has been found advocating or teaching the unlawful destruction of property" (p. 20, Transcript). This too is the charge upon which he was found guilty by the Department (p. 21, Transcript); and is therefore the charge, and the only charge, with which we are now concerned. We have no desire to beg any question in this case but this, we believe, is clear, namely, that, although another charge was preferred informally during the progress of the hearing (p. 255, Transcript), the issue thus presented has been inferentially determined in appellant's favor and that determination is absolutely binding upon this court, for it is clear that this Court has no power under the Immigration statute to order deportation.

Webster's New International Dictionary defines "advocate" as follows:

"To plead in favor of; to defend by argu-

ment, before a tribunal or the public; to support or vindicate."

The same authority defines the word "teach" as follows:

"1. To show, guide, direct.

2. To make to know, to show how; hence to school, train, or accustom to some action; as to teach one to read.

3. To direct as an instructor; to guide the studies of, or to conduct through a course of studies; to give instruction to; as, to teach a child or a class.

4. To impart the knowledge of; to instruct in the rules, principles, practice, or the like, of; to give lessons in; as, to teach Greek, music, morality, dancing.

5. To make aware by information, instruction, experience, or the like; to instruct; tell; cause to know; as Nature teaches a man when to eat; teach us the folly of wrong."

Whether this be regarded as technically a criminal proceeding, or not, clearly in a sense it involves penalties, and in a sense the statute is in derogation of natural rights, from which it follows that it must be strictly construed. By any rule of interpretation, however, both words involve the idea of an act consciously or purposely done. It can scarcely be contended that a person can either "advocate" or "teach" the unlawful destruction of property within the meaning of this Act, unintentionally. Our question, then, narrows itself

to this: Did the appellant consciously and intentionally advocate the unlawful destruction of property? In fact, did he consciously and intentionally advocate anything? What is the "indisputable character of the evidence" on this question? It is not contended, nor can it be, that the appellant ever advocated anything by word of mouth. In fact, not once in all the three hearings did the Inspector question the appellant about his personal advocacy of anything. The appellant is frequently referred to in the Department's correspondence as a most active and dangerous advocate of certain pernicious doctrines. If this be true, why did not the Department produce or even attempt to produce some evidence of it? Why did it not even question the appellant about the matter? It was under a clear moral and legal obligation to do so. *Backus v. Owe Sam Goon,* 235 Fed. (C. C. A. 9 Cir.) 847, 852. The entire examination in the two first hearings was confined to applelant's opinions on certain matters. Presumably the Inspector's purpose was to disclose opinions favorable to the advocacy of the things of which the appellant was accused. Let us examine this testimony. The first reference to the matter is on page 261 of the Transcript:

> "Q: The charge as contained in the warrant of arrest has been read and carefully explained to you, what have you to say as to that charge?

to the mandate of a writ of certiorari, the Assistant Secretary of Labor says "This certificate is entitled to full faith and credit". In that same spirit the appellee made this "record" a part of his return to that writ and tendered it to the Court. Can he be heard now to deny it?

POINT II.

THE FINDING THAT THE APPELLANT WAS GUILTY AS CHARGED IN THE WARRANT IS CONTRARY TO THE "INDISPUTABLE CHARACTER OF THE EVIDENCE", INVOLVES A CLEAR ABUSE OF DISCRETION AND IS VOID.

The principles governing the courts in reviewing the findings and decisions of administrative or quasi-judicial officers have been so often declared by this Court, and are so clearly settled, that in our opinion it would be only a waste of the Court's time and our own to enter upon a detailed examination of the decisions. It is perfectly clear on the one hand that the Court will not review the evidence for the purpose of determining how it preponderates. Neither, on the other hand, is it sufficient that the findings may be sustained by a scintilla of evidence. Jurisdiction is the power to hear and determine, and any valid exercise of jurisdiction involves not only a *hearing* conducted in accordance with the forms of law, but a

determination based upon the evidence. An arbitrary decision which ignores or is contrary to "the undisputable character of the evidence" is not such a determination and is uniformly held to be void. The phrase quoted is taken from the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Whitfield, et al. v. Hanges, et al.,* 222 Fed. 745, at 751, which has often been cited with approval of this Court. Let us examine the evidence in this case in the light of these principles.

The charge made against the appellant in the warrant of arrest is "that he has been found advocating or teaching the unlawful destruction of property" (p. 20, Transcript). This too is the charge upon which he was found guilty by the Department (p. 21, Transcript); and is therefore the charge, and the only charge, with which we are now concerned. We have no desire to beg any question in this case but this, we believe, is clear, namely, that, although another charge was preferred informally during the progress of the hearing (p. 255, Transcript), the issue thus presented has been inferentially determined in appellant's favor and that determination is absolutely binding upon this court, for it is clear that this Court has no power under the Immigration statute to order deportation.

Webster's New International Dictionary defines "advocate" as follows:

"To plead in favor of; to defend by argu-

ment, before a tribunal or the public; to support or vindicate."

The same authority defines the word "teach" as follows:

"1. To show, guide, direct.

2. To make to know, to show how; hence to school, train, or accustom to some action; as to teach one to read.

3. To direct as an instructor; to guide the studies of, or to conduct through a course of studies; to give instruction to; as, to teach a child or a class.

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> "Q: The charge as contained in the warrant of arrest has been read and carefully explained to you, what have you to say as to that charge?

A: Why, in the first place I do not myself, nor to the best of my knowledge does the organization to which I belong, advocate either the overthrow of the United States Government or of any other government by either violence or anyother means. Neither does it advocate the assassination of any official of this Government or of any other government, nor does it advocate the assassination of anybody whatsoever. I do not advocate, nor to the best of my knowledge does the organization to which I belong advocate, the unlawful destruction of property in any way whatsoever. I am not a criminal, nor is the organization to which I belong a criminal organization, to the best of my knowledge."

The next, on pages 262 to 266, inclusive of the Transcript:

"Q: And, of course, as an officer of that organization, and carrying out its work, you are, I take it you are, in sympathy with the literature and propaganda they get out?

A: Yes, to a large extent. There are some views that some writers take which I don't agree with, but as a whole with the object and aims of the I. W. W., as set forth in its preamble and much of its literature, I am thoroughly in accord.

Q: You are in accord with the preamble and constitution of the I. W. W.?

A: Not with the constitution. There are some technical points that I do not agree with, and if I am ever present at any convention of the I. W. W., will do my best to have them changed, but, of course, the constitution itself has nothing to do with the principles of the

organization, as the constitution is merely a form of carrying on work.

Q: Having a leading part in the distribution of the literature of this organization, you are doubtless familiar with their various teachings and propaganda, some of which I quote as follows: 'As a revolutionary organization, the Industrial Workers of the World aims to use any and all tactics that will get the results sought with the least expenditure of time and energy. The tactics used are determined solely by the power of the organization to make good in their use. The question of "right" and "wrong" does not concern us. * * * Failing to force concessions from the employers by the strike, work is resumed and "sabotage" is used to force the employers to concede the demands of the workers.' On the subject of sabotage the following is quoted: 'If you are an engineer you can, with two cents worth of powdered stone or a pinch of sand, stall your machine, cause a loss of time, or make expensive repairs necessary. If you are a joiner or woodworekr, what is simpler than to ruin furniture without your boss noticing it, and thereby drive his customers away. A garment-worker can easily spoil a suit or a bolt of cloth. If you are working in a department store, a few spots on a fabric cause it to be sold for next to nothing. A grocery clerk, by packing up goods carelessly, brings about a smash-up. In the woolen or haberdashery trade, a few drops of acid on the goods you are wrapping will make the customer furious. An agricultural laborer may sow bad wheat in wheat fields, etc.' Another excerpt from Vincent St. John's pamphlet reads as follows: 'Interference by the Government is resented by open violation of the Government's orders, going to jail *en masse*,

causing expense to the taxpayers—which is but another name for the employing class.' 'In short, the I. W. W. advocates the use of militant "direct action" tactics to the full extent of our power to make good." What have you to say to those teachings?

A: Well, we will take them up *seriatim*. 'As a revolutionary organization, the Industrial Workers of the World aims to use any and all tactics that will get the results sought with the least expenditure of time and energy.' But 'any and all tactics' does not necessarily mean destruction, overthrow of government, or assassination. In the first place, violence is a weapon of weakness, and when you use violence or destruction, you show that you are weaker than the other class, and in the end only invite destruction upon yourself. The question of 'right' and 'wrong'. 'Right' and 'wrong' are relative terms, or in other words it is merely a matter of viewpoint. What a working class would consider 'right' for them, such as higher wages, shorter hours, better working conditions, etc., might be looked upon by the employing class as entirely 'wrong' because it means decreased profits. Now, the only question for the working class to consider as a class is, 'Are better wages, better working conditions, more food, clothing, shelter for ourselves, better chance to educate our children, etc., "right" for us, if so, let us have them.' If that means tying up an employer's factory, or his industry, whatever it is, causing him loss of money, which he considers 'wrong', all we have got to consider is whether the 'right' on our side outweighs the 'wrong' on his. I want to make a definite statement regarding sabotage and the I. W. W. Up to the spring of 1918 various individuals, some of them members of the I. W. W., some who

had never heard of the I. W. W., advocated sabotage as a weapon of offense and defense for the working classes. During this period no official action had been taken by the I. W. W. in respect to sabotage, some of them liking it, other did not. Many of them advocated it and at various instances it was used, but in view of the fact that the use of sabotage, or the advocating of sabotage, was reflecting upon us, and threatening to become a boomerang against us as an organization, in April, 1918, the General Executive Board of the I. W. W. took a definite stand in regard to sabotage. This is in the form of a resolution signed by William D. Haywood, Francis Miller and C. L. Lambert, stating that, on account of the distorted meaning that had been given to the word sabotage, and also on account of the fact that the capitalist papers were using the word sabotage to creat a bogy man of the I. W. W., with which to scarce the people, that the I. W. W., from that time on, should go on record as being opposed to sabotage, and that we would destroy all literature on hand in any part of the organization which taught or advocated sabotage. This has been done, and I am prepared at any time to produce a copy of this resolution which has been circulated broadcast by various officers of the I. W. W. Since being in office myself, I have not handled any sabotage literature, neither have I handled the pamphlet by Vincent St. John, from which excerpts have been read into this record."

The next, on pages 267 and 268, of the Transcript:

"Q: Do you believe in the efficacy of this sticker: 'Bolsheviki means majority. Who

are the Majority? The Workers. Let the Workers Rule this Nation. Join the I. W. W.'

A: Why that question is rather crudely put. I believe in majority rule. As a matter of fact, I think the actual meaning of the word 'democracy' means majority rule.

Q: Are you in sympathy with the Bolshevik party in Russia, and their practices?

A: Why, as a working man, I am in sympathy with any effort made by the working class to better their conditions as a class. As to the Bolsheviki themselves, I do not know enough about it to make a definite statement.

Q: Are you in sympathy with any means by which the desired ends might be gained for the working class, be they lawful or unlawful?

A: Why, no.

Q: Do you believe in sabotage as it has been practiced by the I. W. W. members?

A: I do not believe in sabotage, whether as a weapon used by the working class or used against them. As a matter of fact it has been used against them more than it has ever been used by them."

The last, on page 270 of the Transcript:

"Q: Have you any reason or argument to offer as to why you should not be deported to Canada on the charges appearing in the warrant?

A: Well, there are quite a few ways of looking at that. In the first place I do not consider myself a criminal. Iam not, to the best of my knowledge violating any of your laws, neither am I diseased in any way or

> insane, I don't think. I am not a degenerate of any kind. I am not an anarchist. I have not opposed the United States Government in any way nor advocated opposition to the United States Government. Neither have I advocated violation of any of the laws of this country, nor the assassination of any of the citizens of this country or of any other country."

There are many slurring references to this testimony in the Departmental correspondence which we think are not justified and were not amde in a spirit of fairness to the accused. It is inherently difficult for one man to interpret what another has written or to explain another's views; neither is it just clear to us why he should be called upon to do so. Take, for illustration, the examination about certain phrases in Mr. St. John's book and certain other books on sabotage referred to on pages 263 to 266 of the Transcript. Never having circulated any of these books, what did it matter how the appellant interpreted or understood them, or what does it matter now whether his explanation of the passages quoted was correct or incorrect. The authors alone are competent to correctly interpret their ow nviews. As a whole we believe appellant's statements and explanations are frank, exhaustive and careful, and they clearly establish these points beyond contradiction:

1. That he is not an anarchist of any kind and has no sympathy with them.

2. That he does not believe in sabotage or de-

struction of any kind because it is stupid and futile.

3. That he has never advocated sabotage, destruction or violence of any kind.

4. That he has never opposed the government nor opposed nor violated any of its laws. We might add because it is in a sense germane to these questions, that the appellant in all his six years' residence in this country has never been arrested but once (see bottom of p. 269, Transcript), and on that occasion was acquitted by a jury after a nine days' trial (see top of p. 269, Transcript). What more can any government ask even of its own citizens?

Certain portions of the testimony taken at these first two hearings relate to certain literature. On the general subject of this literature appellant said what probably anyone else must have said, that he agreed with some parts and disagreed with others. For some reason his attention was directed to specific items of literature in only three instances during these first two hearings. The first is the reference to Vincent St. John's book and certain books on sabotage above quoted. To this he replied that he had never circulated them and did not believe in sabotage. The second was the statement of the General Executive Board with reference to violence and destruction (p. 274, Transcript), with which it is evident from the

examination as a whole that he was in sympathy. This resolution is set forth at pages 283 to 285 of the Transcript. We are sure there is not a single statement in this entire document of which the most exacting critic can disapprove. The statements of fact are clear and unequivocal and are well reinforced by clear logical reasons. The third and last relates to five stickers (p. 275, Transcript). The question was never asked whether the appellant had ever seen or distributed any of these stickers nor is there anything in the testimony from which such action on his part can be fairly inferred. The subject under discussion at the time was the attitude and practices of the I. W. W. In this connection, it is true, Guiney said, "*We* sold them just as *we* sell other things." Obviously both "*We's*" were used editorially. The stickers in question are the first, second, third, fifth and sixth, set forth on page 277 of the Transcript. Whatever may be said about their artistic merit, we do not believe it can be fairly said that they advocate or teach the unlawful destruction of property.

At the conclusion of the second hearing the record was closed and forwarded to the Department by the appellee, together with the "comprehensive report of Inspector Watkins who conducted the hearing and in whose recommendation that this alien be deported to Canada we most earnestly concur" (pp. 249, 253, inc., Transcript).

On May 5th, 1919, the Department replied to the appellee, "After a review of the record, the Bureau finds itself unable to reach a conclusion on the evidence as it now stands". What does this mean? Surely some conclusion could have been reached on that record; in fact, only one conclusion, namely, that appellant was not guilty. What the Department evidently meant was that it could not reach *the* conclusion it wanted to reach, and so in the same letter it continued, "It is probable that he may have distributed the book entitled, 'I. W. W. Songs to Fan the Flames of Discontent', and this fact should be ascertained. The distribution of this book is sufficient to establish the charge of teaching and advocating the unlawful destruction of property." Truly a fine judicial attitude. And so a third and last hearing was had, at which appellant was questioned solely about certain pieces of literature (pp. 32 and 33, Transcript). The first was a pamphlet written by Grover H. Perry entitled, "The Revolutionary I. W. W." It is merely identified as "one of the pamphlets of your union, of which you are Secretary." However, there is not a word in the entire pamphlet which can by any possibility be construed as teaching or advocating the destruction of property (pp. 37 to 61, inc., Transcript).

The second was a pamphlet written by Vincent St. John entitled, "The I. W. W.—Its History, Structure and Methods." This pamphlet was never

distributed by appellant (pp. 32 and 266, Transcript), so we will dismiss it from further consideration. Transposing the order of the last two, the fourth is a pamphlet entitled, "I. W. W., One Big Union of all the Workers,—The Greatest Thing on Earth." Again there is not a syllable in this whole pamphlet which can possibly be construed as teaching or advocating the destruction of property. The third, and last to be considered, is the pamphlet entitled, "I. W. W. Songs —To Fan the Flames of Discontent—Joe Hill Memorial Edition." The appellant admitted that he had distributed this while Stationary Delegate at St. Maries, Idaho. In part it was the basis of the charge of criminal syndicalism on which he was tried and acquitted there by a jury. We realize this verdict does not constitute a technical bar to deportation for the same act; but it is at least entitled to great respect in determining the question whether the distribution of this book in 1917 can in all the circumstances of this case sustain an order of deportation. The book is set forth at length at pages 99 to 187, inclusive, of the Transcript. Before attempting to analyze it in detail let us remember first that it is a song book written in the florid extravagant language usually found in such books. It might be well to compare any book of college songs. It is not primarily or at all a propaganda pamphlet. Second, let us keep in mind the clear, unmistakable

attitude of the appellant toward violence and destruction as disclosed in the first two examinations, and, third, let us remember that the question to be decided is, "Did the appellant *intend,* in distributing this book, to *advocate* or *teach* the unlawful destruction of property?" In this last connection we should remind the Court that there is no evidence to show the circumstances under which the book was distributed by the appellant, how long a period of time this covered, or how many were distributed, or to whom they were distributed. All this occurred within the first year of appellant's membership in the I. W. W., and there is not a scintilla of evidence that he had either read the book or was familiar with any of its contents, particularly the portions which we shall consider in detail later on.

The book contains 58 separate songs and 30 short interspersed notes on industrial topics. Out of this total of 88 separate items we can find only four, less than 5%, which can possibly be construed as relating even remotely to the destruction of property. Three of these are songs (pp. 127, 148, 175, Transcript), one a short reference to sabotage (p. 170, Transcript). Sabotage, as defined and discussed in labor literature, has a wide variety of meanings, one of which is working clumsily or slowly. This is the meaning suggested by the clumsy heavy wooden sabot (p. 276, Transcript). This is the meaning, and the only mean-

ing, which can be gathered from two (the second and sixth) of the stickers shown on page 277, Transcript, which are referred to by the Inspector as "sabotage stickers" (p. 275, Transcript). In view of this evidence contained in the record itself, can the Court fairly say that either the paragraph on sabotage on page 170 of the Transcript, or the song at page 175 of the Transcript, amounts to advocating or teaching the unlawful distribution of property? We next come to the song, "Casey Jones—The Union Scab", on pages 148 and 149 of the Transcript. The song, as clearly indicated by the title, is a satire on craft unionism, an argument in favor of the industrial plan of organization. It ridicules a railway strike conducted on the craft basis. The same railway strike is similarly ridiculed in Grover H. Perry's pamphlet at page 40 of the Transcript. Far from being an advocacy of violence or destruction, it is a plain criticism of the craft basis of organization on the ground that it inevitably tends to develop such irrational acts. As was stated by the appellant (p. 264, Transcript), "Violence is a weapon of weakness." The basic idea of the I. W. W., which is expressed in this satire, is that if you will organize on the industrial basis, the whole industry will stop during a strike and there will be no occasion for violence.

The only song remaining to be considered is "TA-RA-RA-BOOM-DE-AY" (p. 127, Transcript).

This song pictures an unorganized crew of men on a threshing job. Being unorganized, their employer was able to work them sixteen hours a day. Two of the crew retaliated, as a certain percentage of men will inevitably do in such circumstances. The farmer concluded it didn't pay and now "Gets his men from Union Hall and has not 'accidents' at all." Presumably "Union Hall" in an I. W. W. song book means I. W. W. hall. If so, it is difficult to understand how the song can be considered as an advocacy of destruction by the I. W. W. I presume we will be accused, as the appellant has already been, of attempting to denature these songs by artful interpretation. We will cheerfully admit that there is an inherent fundamental difference in the standpoints from which we and our opponents may view these things. He can probably read violence and destruction in every line of it all. Knowing the I. W. W. and its real attitude toward these questions, we naturally look for another meaning. But the real question is not what we may think or what counsel may think about these songs. The question is, how would Neil Guiney, an I. W. W., interpret them, if, indeed, he ever read or thought of them at all? What, if anything, did he *intend* by their distribution?

This Court has frequently required that a party seeking to establish a fact should produce the best evidence available. The fact sought to be established by the Department, as stated in the Com-

msisioner General's own findings (p. 29, Transcript), is that the appellant "has done all he could to assist in spreading pernicious propaganda." The language of the appellee and of Inspector Watkins is much more intemperate even than this (pp. 249, 253, Transcript). It seems to us that an application of the best evidence rule to this situation should require some pretty clear proofs. In the absence of such proof these remarks from the lips of his judges amount to libels upon the appellant's character of which he has good cause to complain. "The indisputable character of the evidence" developed in the first two hearings is clear. It shows an unmistakable attitude of opposition on the appellant's part to the things of which he is accused. The Department's own reluctant admission of this should be sufficient; and we submit that there is nothing in the evidence developed at the last hearing which in any manner changes the situation.

POINT III.

DEPORTATION PROCEEDINGS UNDER SECTION 19 OF THE ACT OF FEBRUARY 5, 1917, ARE BARRED FIVE YEARS AFTER ENTRY.

It is undisputed that the proceeding in question was instituted under Section 19 of the Act of February 5, 1917. Both the warrant of arrest and

warrant of deportation are specific in their reference to this act (pp. 20, 21, Transcript). It is also undisputed that appellant last entered the United States at Gateway, Montana, in March, 1913 (pp. 257, 20 and 299, Transcript), and that this proceeding was not commenced until Februray 18, 1919, nearly six years afterwards. Section 19 of the Act in question enumerates eleven classes of aliens who may "be taken into custody and deported" "at any time within five years after entry." Each class is clearly designated in a separate clause set off from the others by semicolons, and beginning with the word "any". The proceeding in question is based upon the third clause of this Act. Not only is the language of the statute too clear to be misunderstood but it has been interpreted for us in Subdivision 1, (c) of Rule 22, of the Department of Labor, Bureau of Immigration, as shown in the rules published on May 1st, 1917, at page 66, the language of which is as follows: "Any alien who shall have entered or who shall be found in the United States in violation of the Act of February 5, 1917,; limitation five years; not restrospective." That this is the rule governing this proceeding is certified by H. McClelland, the Law Examiner, at page 27 of the Transcript.

For all of the foregoing reasons we respectively submit that the warrant ordering appellant's de-

portation must be held to be void and appellant discharged from custody.

Respectfully submitted,

GEORGE F. VANDERVEER, *and*

RALPH S. PIERCE,

Attorneys for Appellant.

No. 3384

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NEIL GUINEY,

Appellant,

vs.

R. P. BONHAM, as United States Inspector in Charge of Immigration for the District of Oregon.

Appellee.

Brief of Appellee

Upon Appeal from the United States District Court for the District of Oregon.

BERT E. HANEY,
United States Attorney for Oregon.
BARNETT H. GOLDSTEIN,
Assistant United States Attorney for Oregon.
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STATEMENT

The appellant, Neil Guiney, is an alien and a native of Canada. He came to this country about March 1, 1913. He admits having joined the I. W. W. Organization in October, 1916, and since the latter part of September, 1918, and at the time of his arrest was secretary of the Lumber Workers' Branch of the I. W. W. He was also at various times a stationary delegate, branch secretary and traveling delegate of that organization; his duties consisted of looking after the accounts of the organization, supervising the work, keeping in touch with the members, answering correspondence and superintending the distribution of I. W. W. literature.

The appellant was arrested at Portland, Oregon, on February 20, 1919, upon a warrant of arrest, duly issued by the Acting Secretary of Labor, under the provisions of the Immigration Act of February 5, 1917, and after a hearing accorded to him by Immigrant Inspector W. F. Watkins, the Acting Secretary of Labor on May

27, 1919, found that the appellant, Neil Guiney, an alien, was in the United States in violation of law, to-wit, that he had been found advocating or teaching the unlawful destruction of property and thereupon ordered that he be deported to the country whence he came.

On June 13, 1919, the appellant being in custody under the warrants of arrest and deportation, sued out a writ of habeas corpus from the District Court and that Court having upon hearing ordered the dismissal of the writ, he now prosecutes this appeal.

From the return of the appellee, it appears that the appellant is an alien; that he was arrested upon warrant of deportation duly issued by the Secertary of Labor and that as a result of the hearing conducted in accordance with the Rules and Regulations of the Department, the Secretary of Labor found that the appellant was in the United States in violation of the Immigration Act and warrant of deportation was thereupon issued, which the appellee set up as his authority for the detention of the appellant. Copies of the warrant of arrest and order of deportation, together with the original file, constituting the complete record in this case, were

attached to and made a part of the return.

In his behalf, the appellant contended that the record of his examination contained no evidence sufficient to substantiate the charge and that the findings of the Commissioner General of Immigration appeared to have been based upon extraneous matter not properly incorporated in the record.

The District Court held that from a careful review of the testimony, it appeared that the appellant was a member and secretary of the Lumber Workers' Industrial Union of the I. W. W., whose duties were to supervise the work of the organization and superintend the distribution of I. W. W. literature among its members; that he avows sympathy with the organization "to a large extent" and "as a whole, with the object and aims of the I. W. W. as set forth in its preamble and much of its literature" he is in thorough accord; that while the appellant denied that he believed in sabotage, or that the order endorsed its use, that the literature promulgated by the organization, did undoubtedly advocate its use and was so shown by the record and that there could be no question but that the record supported the findings of the Commis-

sioner General. As to the second point, the Court held that the extraneous matter complained of was not properly a part of the record, could not have been so considered and that obviously it had no influence with the Commissioner General. (Trans. P. 301). As a matter of fact, this is clearly apparent and readily demonstrable from a perusal of the memorandum of the Commissioner General, dated May 1, 1919, which is attached to the record and which practically constitutes the detailed decision of the Department, being approved by the Acting Seceretary of Labor (Trans. P. 27).

This decision of the Court is attacked upon the following grounds:

1. That the warrant of deportation is void in that it was issued more than five years after the appellant's entry into the United States.

2. That there was no evidence produced at the hearing to sustain the finding that the appellant had ever advocated or taught the unlawful destruction of property.

3. That the hearings held were not conducted in accordance with the forms and

processes of law, in that evidence was submitted to and considered by the Secretary of Labor, without the knowledge of the appellant and which he had no opportunity to examine, explain or rebut.

These objections to the order of deportation are made the basis of the appellant's assignments of error upon this appeal and will be considered and disposed of in the order above enumerated.

I.

RE LEGALITY OF WARRANT OF DEPORTATION

It is contended that because the warrant was issued on February 18th, 1919, and at the time said order and warrant of deportation was made, to-wit: May 27th, 1919, more than five years had expired since the appellant's entry in the United States on to-wit: March 1st, 1913, that therefore the warrant was void.

This contention is apparently made upon the theory that the Immigration Act under which this deportation proceeding was instituted, specifically fixes five years as the period of limitation within which aliens found in the United States WHO ADVOCATE OR TEACH THE UNLAW-

FUL DESTRUCTION OF PROPERTY may be deported.

While it is true that the warrant and order of deportation charge the alien with a violation of the Immigration Act of February 5th, 1917, the fact remains that this Act, insofar as it related to aliens who advocate or teach the unlawful destruction of property, was superseded and amended by the Immigration Act of October 16th, 1918, which was in full force and effect at the time these deportation proceedings were instituted. The order of deportation specifically recited the ground of deportation; to-wit: that the alien was found advocating or teaching the unlawful destruction of property, which charge squarely placed the alien in one of the classes excluded by the Immigration Act of October 16th, 1918, reading as follows:

> "Sec. 1. That aliens who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law; aliens who disbelieve in or are opposed to all organized government; aliens who advocate or teach the assassination of public officials; ALIENS WHO ADVOCATE OR

TEACH THE UNLAWFUL DESTRUCTION OF PROPERTY; aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government, or that advocates the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States or of any other organized government, because of his or their official character, or that advocates or teaches the unlawful destruction of property, shall be excluded from admission into the United States.

Sec. 2. That any alien who, at any time after entering the United States is found to have been at the time of entry, or to have become thereafter, a member of any of one of the classes of aliens enumerated in Section One of this act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided

by the immigration act of February fifth, 1917.

The provisions of this section shall be applicable to the classes of aliens mentioned in this act irrespective of the time of their entry into the United States."

However, the contention of petitioner, with respect to the limitation fixed by the Act of February 5th, 1917, is absolutely without merit, and is palpably frivolous.

Section 19 of the Act of February 5th, 1917, reads as follows:

"That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this act; ANY ALIEN WHO AT ANY TIME AFTER ENTRY SHALL BE FOUND ADVOCATING OR TEACHING THE UNLAWFUL DESTRUCTION OF PROPERTY * * * shall upon the warrant of the Secretary of Labor be taken into custody and deported."

It must be plainly apparent that the words

"at any time after entry," without specifying any limitation of time, as affecting aliens guilty of advocating the unlawful destruction of property, permit of no such interpretation as here urged by appellant. In fact, the true and only logical interpretation to be drawn therefrom, is reiterated in Rule 22 (t) of the Immigration Rules of May 1st, 1917:

> "Any alien who shall be found advocating or teaching the unlawful destruction of property; no limitation; retrospective."

But in any event, we feel that the plain language of the Act of October 16th, 1918, superseding and amending the Act of February 5th, 1917, insofar as this class of aliens is concerned, clearly disposes of the question involved, thereby rendering further discussion on this point unnecessary.

However, we cannot refrain from pointing out the serious consequences of adopting the interpretation of appellant which he sets up as a shield from the manifest purpose of Congress to exclude aliens of his class, irrespective of the time of their entry in the United States. It would mean that unless an alien, within five

years after his entry, into the United States, advocated or taught the unlawful destruction of property, he could thereafter, while still disdaining American citizenship, proceed along those prohibited lines, with impunity. The mere suggestion of this situation would indicate the fallacy of such a contention. Congress had no intention of rendering this country helpless against subsequent insiduous attacks of ungrateful aliens seeking to undermine it, and the Immigration Act of February 5th, 1917, while prescribing limitations in certain specific instances, was clearly made virile enough to reach this class of aliens, at any and all times. This is emphasized by the passage of the Act approved October 16, 1918, entitled "An Act to exclude and expel from the United States aliens who are members of the anarchistic or similar classes."

It is further urged by appellant that while the direct charge upon which the warrant of arrest and order of deportation were issued, may be embraced by the Act of October 16th, 1918, the proceedings are alleged to have been brought under the Act of February 5th, 1917, as recited in the warrant, and that therefore the Government is confined to the remedy afforded by that

Act, and none other.

In criminal cases, where naturally the rules are more exacting, it is elementary that the indorsement of a statute supposed, though erroneously, to support the indictment, does not affect its validity. So, therefore, in this case, an erroneous reference to the statute involved cannot avail the petitioner, so long as he is given sufficient information of the nature of the charge to bring him within one of the classes excluded by law.

As stated in the case of *U. S. vs. Uhl,* 211 Fed. 628:

> "The warrant of arrest for the deportation of an alien need not have the formality and particularity of an indictment, but it must give the alien sufficient information of the acts relied on to bring him within the excluded classes to enable him to offer testimony in refutation at the hearing.
>
> * * * *
>
> Irregularities in the order of arrest do not affect the status of an alien held upon a warrant of deportation after a fair hearing, nor does the fact that the warrant of deporta-

tion is based in part upon a charge not stated in the warrant of arrest."

To like effect are the cases of *Nishimura Ekiu vs. U.S.,* 142 U. S. 651, *Ex Parte Poulioy,* 196 Fed. 437; *U. S. vs. Williams,* 200 Fed. 538.

II.

RE EVIDENCE TO SUPPORT FINDINGS

Before proceeding with the discussion under this heading, it may be well to bear in mind certain well established principles as to the power of exclusion, and the questions open for review by the courts in deportation cases.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. (*Fong Yue Ting vs. U. S.,* 149 U. S. 698.)

The right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare. It is vain to deny the existence of this

right by alleging that human liberty is the most sacred of all natural rights, for the right of living unrestricted in any place may be subjected to limitations in the general interest of political community, as may all rights. To such persons who fall short of living up to those obligations which arise from the enjoyment by them of the hospitality of the particular nation and turn out to be objects of anxiety or permanent sources of danger to the state which receives them, there is no obligation on the part of the state to exercise generosity up to the point of imposing upon its authorities the obligation of keeping them under surveillance for the purpose of thwarting their criminal machinations. (*Bouve on Exclusion of Aliens,* p. 4.)

Proceedings for the exclusion or expulsion of aliens have invariably been held by the courts to be proceedings not criminal in nature, and deportations not to be punishment for crime.

Mr. Justice Gray, speaking in *Fong Yue Ting vs. U. S.* 149 U. S. 698, says:

> "Deportation is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public

welfare, and without any punishment being imposed or contemplated, either under the laws of the country of which he is sent, or those of the country to which he is taken."

The relative powers of the legislative, executive and judicial branches of the government, touching upon the exclusion of aliens, are to be found in the following excerpts from Supreme Court decisions:

"Congress has power to exclude aliens from, and to prescribe the conditions on which they may enter the United States; to establish regulations for deporting aliens who have illegally entered, and to commit the enforcements of such conditions and regulations to executive officers. Deporting, pursuant to law, an alien who has illegally entered the United States, does not deprive him of his liberty without due process of law."

Turner vs. Williams, 194 U. S. 279.

"The final determination of the fact on which the right to land depends may be entrusted by Congress to executive officers, and in such a case as in all others, in which a statute gives a discretionary power to an of-

ficer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. It is not within the province of the judiciary to order that foreigners who have never been naturalized nor acquired any domicile or residence in the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government."

Nishimura Ekiu vs. U. S. 142 U. S. 651.

"The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form.

* * * *

But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and we may add, the de-

nial of a hearing cannot be established by proving that the decision was wrong."

Chin Yow vs. U. S. 209 U. S. 8.

"A series of decisions in this court has settled that hearings or proceedings for deporting aliens before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

Low Wah Suey vs. Backus, 225 U. S. 460.

"The evidence being adequate to support the conclusions of fact of the Secretary of Labor, and there having been a fair hearing, these findings are not subject to review by the courts."

Zakonaits vs. Wolf, 226 U. S. 272.

"It is entirely settled that the authority of

Congress to prohibit aliens from coming within the United States and to regulate their coming includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulation is not a criminal prosecution, within the meaning of the 5th and 6th amendments; that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof and that the findings of fact reached by such officials after a fair, though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question."

Lapina vs. Williams, 232 U. S. 78.

"Where there was evidence sufficient to justify the Secretary of Labor in concluding that the alien was within the prohibitions of the Alien Immigration Act, and the hearing was fairly conducted, the decision of the Secretary is binding upon the courts."

Lewis vs. Frick, 223 U. S. 291.

To like effect are the following cases found in the Federal Reports:

In Re Tang Tung, 168 Fed. 488.
Ex Parte Long Luck, 173 Fed. 208.
U. S. vs. Williams, 190 Fed. 686.
Frick vs. Lewis, 195 Fed. 693.
Ex Parte Pouliot, 196 Fed. 437.
Moy Guey Lum vs. U. S., 211 Fed. 91.
U. S. vs. Uhl, 211 Fed. 628.
U. S. vs. Uhl, 215 Fed. 573.
Ex Parte Hidekumi Iwata, 219 Fed. 610.
Healy vs. Backus, 221 Fed. 358.
Whitefield vs. Henges, 222 Fed. 745.
U. S. vs. Jong You, 225 Fed. 1012.
Wallis vs. U. S., 230 Fed. 71.

The following cases decided by this Circuit are submitted as indicative of the views entertained by this Court upon the subject in issue:

> "In the present case the executive officers found that the aliens were persons likely to become a public charge. This is a ground of exclusion provided by law. In reaching this conclusion, the officers gave the aliens the hearing provided by the statute. This is as far as the court can go in examining such

proceedings. It will not inquire into the sufficiency of probative facts or consider the reasons for the conclusions reached by the officers."

White vs. Gregory, 213 Fed. 768.

"Congress may exclude aliens, regulate their coming, provide for their deportation, and confer on the executive department or subordinate officials thereof the duty to enforce the law.

* * * *

A proceeding to deport an alien is not a criminal prosecution, within the fifth and sixth amendments, and an alien may be deported without a hearing of a judicial character."

Choy Gum vs. Backus, 223 Fed. 487.

"The alleged illegality of her restraint consists in the abuse of discretion on the part of the immigrant inspectors in failing to give her a fair and impartial hearing. We have examined the testimony and we do not think it necessary to repeat it here. The Immigrant Inspector was of the opinion that the evidence was sufficient to show that she was

> guilty of the offense charged in the warrant. There was evidence taken upon the examination which tended to show that she was guilty of the charge. We are not required to weigh the evidence.
>
> *Chan Kam vs. U. S.* 230 Fed. 990.

It is nowhere held that the courts have the right to review the action of the Department of Labor in the matter of admitting or weighing evidence or to consider whether the conclusions drawn by these officials were right or wrong.

As apparent from the foregoing authorities, the only questions to be determined by this court are:

> (1) Whether there was a fair hearing accorded to the alien;
>
> (2) Whether there was *any* substantial testimony, though slight, upon which the Secretary of Labor, as the executive officer charged with the power and duty of deportation could find that the alien was in the United States in violation of the law.

As the only grounds upon which the alien contends that a fair hearing was not accorded

him, are predicated upon his assertion that evidence was introduced into the record which he had no opportunity to meet, and forms the basis of a subsequent assignment of error, we shall, under this assignment, proceed to take up the question of the sufficiency of the evidence to support the Secretary's findings.

In our discussion upon this question, we desire at the outset to make it clear that we shall not consider or refer in any way whatsoever to any of the extraneous testimony, objected to, but shall confine our discussion to the testimony which the alien, himself, gave, together with such exhibits as were specifically called to his attention, and concerning which, an opportunity was afforded him to make such explanation as he desired in connection therewith.

The record in this case shows that on Feb. 20, 1919, the first hearing in this proceeding was had (Trans. P. 254). At that time W. F. Watkins, Immigrant Inspector, informed the appellant, Neil Guiney, that the purpose of the hearing was to afford him an opportunity to show cause why he should not be deported; the warrant of arrest was read and explained to him

and thereupon, Neil Guiney, testified as follows:

That he was born in Lillooet, British Columbia, on Feb. 3rd, 1890, was single, had never been naturalized in this country and was still a subject of Canada; that he came to this country in March, 1913, entering at Gateway, Montana; that his occupation is that of lumberjack, and at the time of his arrest and hearing was Secretary of the Lumber Industrial Union of the I. W. W., having been a member of the I. W. W. since October 7th, 1916, and as Secretary thereof, since October 1st, 1918. In addition to that position, he had also been stationary delegate, branch secretary and traveling delegate of that organization; that he had just opened up his headquarters for the I. W. W. in Portland, when arrested; that there are about 35,000 members of the Lumber Industrial Workers Union; that he received a salary of $28 a week as Secretary; that he registered under the Selective service law, but claimed and secured exemption from service on the ground of being an alien;

Q. Why did you not return to Canada and serve in the military forces of that country during the war?

A. I don't know as there was any especial reason why I didn't.

Q. Merely that you didn't wish to go to war?

A. That's the only reason.

(Trans. P. 261).

he stated that as Secretary of the Lumber Workers' Union of the I. W. W. his duties were to look after the accounts and funds of the organization, to keep in touch with the members, to answer correspondence and to superintend the distribution of the I. W. W. literature among the members of the organization.

Q. And, of course, as an officer of that organization, and carrying out its work you are, I take it, in sympathy with the literature and propaganda put out?

A. Yes to a large extent. There are some views that some writers take which I don't agree with, but as a whole with the object and aims of the I. W. W. as set forth in its preamble and much of its literature, I am thoroughly in accord.

(Trans. P. 262).

When questioned as to some of the literature distributed by the I. W. W. indicating that the organization aims to use any and all tactics that will get results, with the least expenditure of time and energy, and that the question of right and wrong does not concern its members, the appellant, while not denying that the I. W. W. is a revolutionary organization, seeks to explain that "any and all tactics" does not necessarily mean destruction or overthrow of government or assassination, but he makes no effort to define the application of the phrase as understood in the order. And so of the words "right" and "wrong" he seems to think they are relative terms merely, but insists in effect that his order is the sole judge of their application, regardless of how it may affect the employer class. (Trans. P. 264).

He identified a letter written at Fulton, La., on Feb. 3rd, 1918, written to him by J. F. Beal, relative to the distribution of I. W. W. literature. (Trans. P. 289).

He was further advised that he was entitled to the privilege of counsel in this hearing who could be present from that time and represent him.

Q. Do you desire to avail yourself of this privilege?

A. No.

(Trans. P. 270).

and at the same time was afforded an opportunity to submit any reason or argument he might wish to offer as to why he should not be deported to Canada on the charges appearing against him in the warrant, whereupon the appellant volunteered this further statement:

> "I came to this country as a Canadian. I absorbed my radical ideas in this country, and you want now to deport me for having those ideas. You can take me out of the country, but that won't take my ideas out of my head. Instead of stopping the spread of those ideas you will be helping me spread them, because I will take them with me wherever I go. Furthermore, if my ideas are a menace to this country and I have absorbed them in this country, why should you try to force such a menace on any other country. This is merely stating a reason, understand, why I should not be deported, not that I care very much where I am."

(Trans. P. 271).

At a further hearing held on March 4th, 1919, (Trans. P. 272) the petitioner identified a letter written by Otto Eisner, signing himself No. 295,-458, dated January 21st, 1919, the said Eisner being one of the members of I. W. W. recently convicted at Sacramento; (Trans. P. 293) also a letter written by him on Feb. 19th, 1919, to one, C. A. Rogers (Trans. P. 290); also a letter written by one Flogaus, addressed Care of E. I. Chamberlain, and written from the U. S. Immigration Detention House (Trans. P. 273-293), all of which letters pertain to the I. W. W. organization, and are set out in full in the transcript of record.

When questioned as to the I. W. W. stickers and literature indicating an encouragement of sabotage, the appellant testified as follows:

> Q. If the I. W. W. as an organization was opposed to the use of sabotage, why did they print literature and documents encouraging that sort of action?
>
> A. I did not state that the I. W. W. was opposed to sabotage. I stated that they had never taken any action one way or another

until 1918.

Q. They certainly encouraged it, did they not, by the printing of this sort of stuff and putting it out with their official seal on it?

A. I—they probably did, yes.

Q. What is the I. W. W. symbol for sabotage?

A. Their symbol for sabotage? They have many symbols. Sometimes the black cat—sometimes the wooden shoe.

(Trans. P. 275).

At the final hearing held May 10th, 1919 (Trans. P. 32), the appellant was specifically questioned as to the pamphlets and literature circulated by the Lumber Workers Industrial Union of the I. W. W., of which he was Secretary, and thereupon he admitted that among other literature he has distributed were "the Revolutionary I. W. W." by Grover H. Perry (Trans. P. 37); the "I. W. W. Song Book" (Trans. P. 99); and the pamphlet entitled "I. W. W. One Big Union of all the Workers — The Greatest Thing on Earth" (Trans. P. 188).

The doctrines and practices of the order, as

disclosed by this literature, may be indicated by short excerpts thereof:

From the Revolutionary I. W. W.

"The I. W. W. is fast approaching the stage where it can accomplish its mission. This mission is revolutionary in character. (Trans. P. 46).

We are not satisfied with a fair day's wages for a fair day's work. Such a thing is impossible. Labor produces all wealth. We are going to do away with capitalism by taking possession of the land and the machinery of production. We don't intend to buy them either."

(Trans. P. 47).

From the I. W. W.—ONE BIG UNION

THE I. W. W. PREAMBLE

"The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people and the few, who make up the employing class have all the good things of life.

Between these two classes a struggle must go on until the workers of the world organ-

ize as a class, take possession of the earth and the machinery of production and abolish the wage system."

(Trans. P. 188).

From the I. W. W. Song Book

HARVEST WAR SONG

We are coming home, John Farmer; we are coming back to stay.
For nigh on fifty years or more, we've gathered up your hay.
We have slept out in your hayfields, we have heard your morning shout;
We've heard your wondering where in hell's them pesky go-abouts?
It's a long way, now understand me; it's a long way to town,
It's a long way across the prairie, and to hell with Farmer John,
Up goes machine or wages, and the hours must come down
For we're out for a winter's stake this summer, and we want no scabs around.

(Trans. P. 113).

TA-RA-RA BOOM DE-AY

I had a job once threshing wheat, worked

sixteen hours with hands and feet,
And when the moon was shining bright,
they kept me working all the night
One moonlight night, I hate to tell, I "acci-
dentally" slipped and fell,
My pitchfork went right in between some
cog wheels of that thresh machine.

Ta-ra-boom de-ay,
It made a noise that way,
And wheels and bolts and hay
Went flying every way,
That stingy rube said, "Well,
A thousand gone to hell."
But I did sleep that night,
I needed it all right.

Next day, that stingy rube did say, "I'll bring
my eggs to town today,
You grease my wagon up, you mutt, and
don't forget to screw the nut."
I greased his wagon all right, but I plumb
forgot to screw the nut,
And when he started on that trip, the wheel
slipped off and broke his hip.

(Trans. P. 127).

CHRISTIANS AT WAR

Onward, Christian soldiers! Duty's way is plain,
Slay your Christian neighbors, or by them be slain.
Pulpiteers are spouting effervescent swill,
God above is calling you to rob and rape and kill.
All your acts are sanctified by the Lamb on high,
If you love the Holy Ghost, go murder, pray and die.

Onward, Christian soldiers, rip and tear and smite,
Let the Gentle Jesus, bless your dynamite.
Splinter skulls with shrapnel, fertilize the sod,
Folks who do not speak your tongue, deserve the curse of God.
Smash the doors of every home, pretty maidens seize,
Use your might and sacred right to treat them as you please.

Onward, Christian soldiers! Eat and drink your fill,
Rob with bloody fingers, Christ O K's the bill.

Steal the farmer's savings, take their grain
and meat,
Even though the children starve, the Saviour's bums must eat.
Burn the peasants cottages, orphans leave
bereft,
In Jehovah's holy name, wreck, ruin, right
and left.

Onward, Christian soldiers! Drench the land
with gore;
Mercy is a weakness all the gods abhor,
Bayonet the babies, jab the mothers, too;
Hoist the cross of Calvary, to hallow all you
do,
File your bullets' noses flat, poison every
well,
God decrees your enemies must all go plumb
to hell.

(Trans. P. 135).

SHOULD I EVER BE A SOLDIER

We're spending billions every year
For guns and ammunition,
"Our Army" and "Our Navy" dear,
To keep in good condition;
While millions live in misery,

And millions died before us,
Don't sing "My Country, 'tis of thee,"
But sing this little chorus:
Should I ever be a soldier,
'Neath the Red Flag I would fight.
Should the gun I ever shoulder,
It's to crush the tyrant's might.
Join the army of the toilers,
Men and women fall in line,
Wage slaves of the world! Arouse!
Do your duty for the cause,
For Land and Liberty.

(Trans. P. 112).

There also appears the following contributions in the song book:

"Our country? The country of millions of hunted, homeless, hungry slaves! The country of Colorado, Louisiana, Texas, Michigan, Pennsylvania, West Virginia and all the other innumerable scenes of labor's shambles? Not OUR country."

(Trans. P. 117).

"Make it too expensive for the boss to take the lives and liberty of the workers. Stop the endless court trials by using the Wooden

Shoe on the job."

(Trans. P. 170).

"War is Hell. Let the capitalists go to war to protect their own property."

(Trans. P. 170).

" 'Military preparedness' is a part of the 'preparedness of the capitalist class' for larger and more intensive exploitation of labor. One Big Union of the working class will be sufficient 'preparedness' to enable the working class to overcome their enemy—ON ANY FIELD."

(Trans. P. 181).

In the face of this record, showing as it does, three separate hearings, at each of which he was given full and ample opportunity to make such explanation, as he could of the charges filed against him, can it be seriously urged that the appellant was not afforded a fair and impartial hearing, particularly when he was apprised of his right to counsel, of which he did not care to avail himself.

From a careful review of the testimony, the following findings of fact were found by the Commissioner General, which are plainly fair

and impartial, and are clearly supported by the record:

> "The above named alien was arrested at Portland, Ore., on the ground that he has been found advocating or teaching the unlawful destruction of property.
>
> "This man states that during his period of residence in this country he has for the most part been employed as a lumber jack in the forests of the northwest; that he became a member of the I. W. W. in October 1916, and since the latter part of September, 1918, he has been Secretary of the Lumber worker's branch of the I. W. W., also that he has been at various times stationery delegate, branch secretary and traveling delegate. He is now in charge of the Union headquarters of the lumbermen's branch, Portland, which has a membership of about 35,000. He says that his duties as Secretary of the lumbermen's branch of the I. W. W. are to look after the accounts of the organization, supervise the work, keep in touch with the members, answer correspondence and superintend the distribution of I. W. W. literature.

He says that while he does not agree in all things with some of the I. W. W. writers he is in thorough accord with the objects and aims of the organization as a whole. As to the question of sabotage he attempts to say that the I. W. W. does not teach this doctrine. At the same time he admits that among other I. W. W. literature he has distributed the pamphlet entitled I. W. W. Songs and The Revolutionary I. W. W. These pamphlets are made a part of the record and an examination of same will clearly show that the first mentioned one does teach the doctrine of sabotage or the unlawful destruction of property and the second BOLSHEVISM, as will be noted from an excerpt taken from it as follows: 'We are going to do away away with capitalism by taking possession of the land and the machinery of production. We don't intend to buy them either.' "

(Trans. P. 27).

Bearing in mind this record, we fail to see wherein the Court could say there was *no* substantial evidence to sustain the charge that the petitioner was found advocating or teaching the

unlawful destruction of property.

"To teach" as defined by the Standard Dictionary is "to impart knowledge by means of lessons; to give instructions in; communicating knowledge; introducing into or impressing upon the mind as truth or information.

"To advocate" means, according to the same authority: "to speak in favor of; defend by argument one who espouses, defends or vindicates any cause by argument a pleader, upholder, as an advocate of the oppressed."

As stated by District Judge Neterer, in *ex parte Bernat,* 255 Fed. 429, a similar case:

> "There are several ways by which a person may teach or advocate. It need not be from the public platform, or through personal utterance to individuals or groups, but may be done as well through written communications, personal direction, through the public press, or through any means by which information may be disseminated, or it may be done by the adoption of sentiment expressed or arguments made by others which are distributed to others for their adoption and guidance."

As disclosed by the record, Neil Guiney, was and is an active exponent of the doctrines of the I. W. W., holding an important office in the organization, being Secretary of the Lumber Worker's Union, which he claims to have a membership of about 35,000. By reason of his leadership in that organization, he naturally is actively instrumental in spreading the propaganda of that order.

The notorious and unlawful practices for which this organization has been responsible, through its members, and which it has openly advocated are so well known and numerous as to hardly require any extended comment. It is a well established fact, that the I. W. W. has long advocated "direct action," sabotage, destruction of property, if necessary and various other means of gaining the object sought.

In the case of *U. S. vs. Swelgin,* 254 Fed. 884, which was a suit to cancel a certificate of citizenship, on the ground of Swelgin's connection with the I. W. W.—the principles and tactics of which order were in issue, the Court said:

> "No one can read these pamphlets and pronunciamento of the order without con-

cluding by fair and impartial deduction that it is not only ultra socialistic but anarchistic. It is really opposed to all forms of government. It advocates lawlessness and constructs its own morals, which are not in accord with those of well ordered society. It's adherents are anti-patriotic. They owe no allegiance to any organized government."

We therefore contend that the objection that there was no substantial evidence to support the findings of the Department is without merit. Not only that, but we believe that the court will go further and agree with the conclusions reached by the Commissioner General as found in his memorandum report to the Secretary of Labor:

> "That in view of his admitted activity in selling and distributing sabotage-teaching literature, the Bureau finds that he is guilty of the charge of advocating or teaching the unlawful destruction of property and upon that ground recommends his deportation to Canada."

This was likewise the opinion of the lower court, and upon a record, such as this, other

courts in other districts have come to like conclusions.

In re Dixon and *in re Bernat,* reported in 255 Fed. 429, Judge Neterer denied writs of habeas corpus, also sought through George Vanderveer, the attorney for the appellant in this case. Dixon and Bernat, aliens, were both members of the I. W. W. who were ordered deported on the grounds that they had been found advocating and teaching the unlawful destruction of property. It was likewise contended that they had been denied a fair hearing and that there was no evidence to support the charge against them. It was established at the hearing that they believed in the teachings advocated by the I. W. W., as disclosed by certain of its literature, among others, being the I. W. W. song book. The court, in its opinion held:

> "The testimony shows that Bernat has been a member of the I. W. W. for the last ten years, and Secretary of Branch No. 500, Seattle, for some time. His duties as such
>
> Secretary were to distribute literature, collect dues, handle accounts and solicit new members. From activity, as disclosed in the

record, the Court cannot say there is no evidence upon which to predicate the finding of the Commissioner General in each case. * * *

The matter is not before the court for review, but merely to determine whether there is any evidence upon which to base the finding. Under the law, the conclusion of the Department of Labor, if there is any evidence, is final."

On June 5th, 1919, District Judge Augustus Hand of the Southern District of New York, had occasion to test the legality of warrants of deportation of a number of aliens under the Act of Feb. 5th, 1917, on the ground that they advocated the destruction of property. The petitioner in each of those cases was an active member of the I. W. W. in the northwest, and had distributed its literature. While being held in New York, after being conveyed across the continent, under orders of deportation, they sued out writs of habeas corpus. Among them were Bernat and Dixon who had been unsuccessful in this attempt before Judge Neterer, as hereinbefore cited.

Judge Hand, in disposing of these cases, made the following comments, which are cited, in so far as they apply to the case in issue:

"The songs offered in evidence at the hearing such as the 'Harvest War Song' which contains the words, 'Up goes machine or wages' and 'Ta-Ra-Ra-Boom De-Ay' which has the line, 'My pitchfork went right in between some cog wheels of that thresh machine' plainly are intended to commend destruction of property. Though Kisil had counsel, no attempt was made to show that the songs attached to Exhibit A, which the Government offered in evidence at the hearing were not the editions in the possession of the relator, and it cannot be said that the sentiments expressed in these songs, which I have quoted above, did not furnish some evidence that the relator was engaged in circulating sabotage literature and consequently in advocating the destruction of property."

(In re Kisil).

"This relator testified before the Inspector that he did not believe in the destruction of property, but he had a stock of literature with which he was familiar, including the

book of Vincent St. John on 'The I. W. W., Its History, Structure and Methods,' published by the I. W. W. Publishing Bureau, and Walker C. Smith's Book on Sabotage. While he insists that the sabotage he believes in is not destruction of property, but only a slowing down of work or withdrawal of efficiency, and contends that the Walker C. Smith book is of only historical significance he was plainly seeking to enroll members, had literature for distribution which distinctly advocated sabotage and it I think sufficiently appears that he was engaged in distributing it. There was some evidence in support of the findings of the Commissioner as well as significant equivocation."

(In re Holm)

"In view of the fact that Bernat was Secretary of the Seattle branch and testified that he distributed literature, and in view of the fact that Exhibit B tends to show that the songs, the book of Vincent St. John and the book of Walker C. Smith were generally handled and distributed by the Seattle Branch, it cannot be said that there was no evidence before the Department, that the re-

lator advocated or taught destruction of property. To be sure, the relator denies that he believes in sabotage of a destructive kind, but his own statement is to be weighed against the fact that literature which intimates in effect that sobotage of a destructive kind is a desirable thing was generally distributed at the branch of the I. W. W. of which he was Secretary, and that the proceeds of sales apparently went into the treasury of the organization. The weight of these varying considerations was for the Commissioner of Labor and in deciding against the relator he cannot be said to have acted without evidence."

(In re Bernat)

"This man was taking applications for membership with knowledge of the class of literature which it appears from Exhibit B was being distributed through the branch officers of the organization, and was distributing the Industrial Worker, which in general appears to advocate the destruction of property.

"It is to be noticed that the booklet con-

taining the Preamble and Constitution of the I. W. W. advertises the I. W. W. songs and that at the bottom of page 15 of the Constitution, the Publishing Bureau is described as the 'official organ controlled by the general organization.' The book of Vincent St. John, like the song book, has on the cover, 'I. W. W. Publishing Bureau,' so that apparently the direct testimony in Exhibit B that the song books and the book of Vincent St. John are official publications of the I. W. W. is completely borne out. The relator was familiar with these official publications. He was therefore working to recruit members for, and promote the growth of the organization that publishes through its own Bureau, and circulates through its agencies, St. John's pamphlet, a book which described sabotage as a desideratum under certain circumstances. Furthermore, he specifically states that he is in favor of the teachings of the publication. * * One who solicits members for an organization when he knows that it disseminates such publications and who distributes the Industrial Worker that has constantly approved of

sabotage, may be held by such acts to teach the unlawful destruction of property himself."

(In re Dixon)

"The relator was a delegate and organizer of the I. W. W. He admitted distributing the book of Vincent St. John, though he denied distributing Pouget's book on Sabotage, and said Walker C. Smith's book was not for distribution to new members because they might abuse it. * * * His admitted distribution of book of Vincent St. John gave rise to a question of fact which the Commissioner might resolve against him in respect to advocacy of destruction of property."

(In re De Wal)

In his conclusion upon all these cases, District Judge Hand, in disposing of the contention that the I. W. W. literature offered does not involve advocacy of destruction of property, said:

"Most members of the I. W. W. organization may at the present time, either on grounds of principle or expediency, disbelieve in destructive sabotage, but those who distribute to prospective members the I. W. W. Songs of the edition appearing in Ex-

hibit A, the pamphlet of Vincent St. John, 'The I. W. W. Its History, Structure and Method,' and the book of Walker C. Smith on Sabotage for the purpose of familiarizing such prospective members with the doctrines and spirit of those publications, are open to a charge of advocating or teaching the destruction of property. These publications contain intimations that destructive sabotage may be desirable and useful. The possession for the purposes of distribution, or the distribution of such literature by an alien is some evidence of teaching the destruction of property upon which the Commissioner may make a finding against him, which no court has a right to disturb."

In view of the foregoing, it is respectfully submitted, without again reviewing the record of this case, that the one positive circumstance, irrespective of all the circumstantial evidence, that Neil Guiney, an active delegate, organizer and officer of the I. W. W. organization, participated in the distribution of the I. W. W. song book constitutes some evidence that he has been advocating the unlawful destruction of property in violation of the Immigration Act. Under the

law, the conclusion of the Department of Labor, if there is any evidence, is final. (*Nishimura Ekiu* vs. *U. S.* 142 U. S. 651), (*Turner* vs. *Williams,* 194 U. S. 279), (*Low Wah Suey* vs. *Backus* 225 U. S. 460),(*Healy* vs. *Backus,* 221 Fed. 358), (*Jeung Bock Hong* vs. *White,* 258 Fed. 23).

III.

It is further urged that there was introduced in evidence and incorporated in the record in this case, certain correspondence, which the appellant claims he had no opportunity to explain or rebut, and which he claims influenced the Commissioner General of Immigration or the Secretary of Labor in considering and determining this case. It is also suggested by way of illustration, that this was damaging to his cause, in that an agent of the Department of Justice reported that the petitioner had been convicted of a felony in the State of Idaho which statement was untrue.

This contention is clearly without merit. As can be readily observed, from an examination of the record, it consists of the complete file of the Department, and of necessity, contains documents and communications which may or

may not be hearsay, anonymous and immaterial, but which under a general filing system, are attached to the file, for ready and accurate future reference and for proper handling of correspondence. It may very well include, as it would, any communication received from the appellant's attorneys or his friends, protesting his innocence, etc., but it is unreasonable to assume or infer that such communications, unless examined into and properly introduced in evidence could or would have any bearing upon the merits of the case, or would influence the decision of the reviewing authorities.

This explanation must plainly be conclusive, as evident from a perusal of the memorandum of the Commissioner General summarizing the evidence which practically constitutes the detailed decision of the Department, being signed by the Commissioner General and approved by the Acting Secretary of Labor.

It will further be noted in this connection that the memorandum particularly calls attention to the fact that Guiney was acquitted on the charge of syndicalism in Idaho, and particularly refrains from discussing any other evidence,

except the admissions of the appellant and certain pamphlets properly competent and material in the case.

It will thus be seen that the immaterial, incompetent and hearsay testimony objected to by counsel could not under any circumstances have been taken into consideration by the Department.

Moreover, it is our contention, that it matters little what the files of the Department contain, provided that it does contain some evidence, that is material and competent, and supports the findings reached by the Secretary of Labor. This has already been demonstrated under a previous heading.

It is apprehended that the real purpose of the petitioner in raising this point is to discredit the officials of the department, charged with a sworn duty of enforcing the immigration laws, and to attack the integrity of the records.

Every officer who takes part in the formulation of these records is under the obligation of an oath of office requiring him properly to perform his official duties. If counsel has any complaint to make with regard to the conduct of the immigrant inspectors, or other officials or

employes who participated in these examinations, such complaint should be submitted, with its supporting evidence, to the Secretary of Labor or the Commissioner General. A habeas corpus proceeding is not the proper method of charging government officials with misconduct or proving them guilty. The officers are not on trial here. Furthermore the alleged "misconduct" is charged to a person not even in the Department of Labor, let alone the Immigration service which is solely responsible for the enforcement of deportation proceedings, but is charged to a person in an entirely different department; to-wit, the Department of Justice, the actions of which are not controlled by the Department of Labor or the Immigration Service.

If it is contended, on the other hand, that the Department, though acting in good faith, considered immaterial and hearsay evidence, outside the record, the following authorities must be conclusive of our contention, that this point is of no avail, where there was some proper evidence in the case to support the findings.

It should first be borne in mind that proceedings for the deportation of an alien under the im-

migration statutes are in no proper sense a trial for a crime or offense nor governed by the rules of such trials as to pleadings or evidence (*Siniscalchi v. Thomas,* 195 Fed. 701), (*In re Jun Yuen,* 188 Fed. 350), (*U. S. v. Uhl,* 215 Fed. 573), (*Ex parte Hidekuni Iwata,* 219 Fed. 610), (*Healy v. Backus,* 221 Fed. 358).

In the case of *Tang Tun v. Edsell,* 223 U. S. 673, it was urged, that incompetent evidence was injected into the record which was submitted to the Secretary of Labor. The Supreme Court held that neither the nature of these statements, nor the manner of their introduction, afforded ground for invalidating the proceeding.

> "Of these the Secretary might at all times take cognizance, and it would be extraordinary indeed to impute bad faith or improper conduct to the executive officers because they examined the records or acquainted themselves with former official action."

In the case of *Frick v. Lewis,* reported in 195 Fed 693, and affirmed in 233 U. S. 291, the court said:

> "Where a fair, though summary hearing has been given in ascertaining whether there

is or is not any proof tending to sustain the charge it is not open to the court to consider either admissibility or weight of proof, and they cannot interfere if anything was offered that tends, though slightly, to sustain the charge."

In the case of *In re Tang Tung,* 168 Fed. 488, the court said:

"That after examining the record and finding that a bona fide hearing had been granted, under such circumstances we do not understand * * * that any court is authorized to review the action of the Department of Labor in the matter of admitting or weighing evidence, or to consider whether the conclusions drawn by its officials were right or wrong."

In the case of *In re Jem Yuen,* 188 Fed. 350, the court said:

"Whether there was a fair hearing or not in the present case must be determined by the record, and the record, according to the petitioners' contention, shows that a fair hearing has been denied. The hearing at Boston is said to have been unfair because

INADMISSIBLE EVIDENCE was considered. The hearing on appeal is said to have been unfair because of alleged improper additions made to the record submitted at Washington and because the Secretary of Labor does not appear to have himself considered or decided it. As to the hearing at Boston there is no complaint that the applicant was in any way hindered in submitting such evidence as he desired, or of any refusal to hear what was submitted.

The complaint is that a record of proceedings of similar character at Richmond, Vt., in October 1908 and before the department on appeal was considered. This record purported to show that Jim Yuen then and there attempted to enter the country, was excluded after a hearing, and the exclusion was affairmed on appeal. WHETHER SUCH A RECORD WAS ADMISSIBLE OR NOT ACCORDING TO THE RULES OF EVIDENCE OBSERVED ELSEWHERE IS IMMATERIAL.

It is well settled that officers of the Government to whom the determination of ques-

tions of this kind is entrusted under the statutes like those governing these proceedings, are not bound by the rules of criminal procedure, nor by the rules of evidence applied in courts. It is not enough for a review of their decision on habeas corpus that there was no sworn testimony or no record of the testimony or of the decision. No formal complaint or pleadings are required. The alien's opportunity to be heard need not be upon any regular set occasion nor according to the forms of judicial procedure; it may be such as will secure the prompt vigorous action contemplated by congress and appropriate to the nature of the case.

I am unable to believe that the duty of the officers to give a fair hearing required them to shut their eyes to the contents of this former record or to do so without formal or independent proof of its contents."

In *Ex parte Poulioy,* 196 Fed. 437, District Judge Rudkin said:

"The ex parte affidavits taken * * * * could not change the result. Were I to exclude all incompetent testimony and determine the case de novo on the competent tes-

timony alone, I could not reach a different conclusion."

In *Ex parte Kwan So,* 211 Fed. 772, it was contended that the Immigrant Inspector acquired his information from sources outside the record, and based his judgment upon facts which were not made part of the record in a formal way. The court said:

> "While it is somewhat difficult for the mind, accustomed to the contemplation only of investigations conducted strictly in accordance with the time honored rules of judicial procedure, to adjust itself to the informal and sometimes ex parte methods of administrative efficers, I do not think that under the law as the same has been interpreted by the supreme court, the inspector was disqualified. Indeed, sometimes, in our court procedure, judicial officers act upon facts within their own knowledge and do not resort to formal proofs in the nature of sworn testimony."

A somewhat similar objection was urged in the case of *Choy Gum v. Backus,* 223 Fed. 487, arising in this Circuit. It was there charged that

the immigrant inspector clandestinely forwarded to Washington certain evidence which was never presented to the alien. This court held:

> "This kind of testimony while not ordinarily competent for judicial inquiry in the sense of a trial in a court of justice, has nevertheless been resorted to before executive officers and boards of immigration inspectors for determining the right of aliens to remain in this country and yet the aliens have been refused their liberty upon habeas corpus where the inquiry appeared to be fair and impartial, and where the immigration officers have been guilty of no abuse of discretion reposed in them. Such a case was *Healy v. Backus,* 221 Fed. 358. In that case many affidavits were taken and admitted, both for and against the petitioner and a very wide range of inquiry was indulged in by which information was gathered by means of letters and reports, and yet the court was of the view that the inquiry was fairly conducted toward the aliens."

In the case of *Wallis v. U. S.,* 230 Fed. 71, the court disposed of this objection in the following language:

"The evidence submitted to the Secretary of Labor was the testimony of each of the relators upon the hearing, the documents and articles found in their possession when arrested, and the hearsay result of certain inquiries of the immigration inspector addressed to the employes of the railroad upon which the relators were traveling when arrested. WE WILL DISCARD THE HEARSAY STATEMENTS and confine our consideration to the admissions of the relators and to the documents and articles found on them when arrested."

The rule is well stated in the case of *Lee Lung v. Patterson,* 186 U. S. 168, wherein the Supreme Court said:

"He (the Chinese Inspector) may determine the validity of the evidence or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal invested with the jurisdiction of a matter loses that jurisdiction by not giving sufficient weight to evidence or by rejecting proper evidence, or by *admitting that which is improper.*"

While the foregoing authorities would indicate that the Secretary of Labor may for certain purposes take official cognizance of the records of his department outside the precise record in the case, we do not wish to be understood as urging the broad contention that such evidence may be considered, where the alien was not confronted with same. We merely claim that the Secretary of Labor did not lose jurisdiction over this case simply by having incorporated in the record as part of the files, certain hearsay statements and evidence which are immaterial, provided there was proper proof adduced at the hearing, which in itself, was sufficient to justify the findings, as heretofore shown.

CONCLUSION.

Congress by the Immigration Acts of February 5th, 1917, and October 16th, 1918, was of the opinion that the tendency of the general exploitation of such views, as entertained by those advocating or teaching the unlawful destruction of property, is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population—whether permanently or temporarily—whether many or few. That this power of self preservation is vest-

ed in Congress cannot be questioned. (*Turner v. Williams,* 194 U. S. 279.)

In the light of present events, the enactment of these laws was not only justifiable but absolutely necessary. The world's greatest menace today is not war, nor famine, nor the plague, but all of these combined and more, in what is known as Bolshevism. Bolshevism is nothing more than radical socialism or I. W. W.ism, in that they teach that the working class ought to control the Government. The danger that faces us today is that Bolshevism or I. W. W.ism will become world wide. Already it has spread most alarmingly. I. W. W.ism means repression and despotism. As thus far carried out in practice, it is evil and only evil. In this great country of ours, there is no need nor excuse for anarchism nor for bolshevism nor for I. W. W.ism nor for any of the other untried or discredited isms. There can be no justification nor excuse whatever for the attitude of those who preach or advocate political creeds or doctrines in conflict with the fundamental principles of our great free American government. Call it socialism, Bolshevism or I. W. W.ism. What's in a name? Their consistency is their only merit. They practice

just what they preach. Its primary object, as expressly avowed, is to overthrow existing governments—peacefully so far as discreet, but by organized violence when feasible. Next, all control of government is to be seized by the proletariat—which means the present laboring, wage-earning class. This means a seizure of the State in all of its functions, legislative, judicial and executive. Our Government is based upon a theory the very opposite of that which is the basis of I. W. W.ism. The basic theory of our Government recognizes individual property rights and the right of contract, which rights are the basis of private industrial enterprises, and safeguards the maintenance of these rights by fundamental laws controlling upon the law making power of the states and of the nation. I. W. W.ism in this country today teaches that our government is a government of fraud and of robbery, a government of injustice, a government of oppression, a government wicked in its formation, wicked in its administration and wicked in all of its promises for the future.

Such is the danger of the advocacy of the views entertained by Neil Guiney, who is permitted to remain in this country, simply by suf-

ferance. He is not one of us, and does not want to be one of us. He is an alien by birth and an agitator by choice. He has no place in this great country of ours. He is an avowed believer in the principles of the I. W. W. organization—an organization inimical to the maintenance and stability of organized government—an organization that has sprung up in this country, looking toward its demoralization and degradation. He is more than a follower—he is a leader in that organization, with ability to incite its members to the practices to which such organization is committed. He is a potent power of influence among that class of revolutionists. His release would only have the effect of producing greater difficulties to the officers of the Government to stamp out those who agitate and breed discontent.

It would be futile to shut our eyes to what the I. W. W. stands for. It is no longer a matter of opinion or conjecture. It is a disloyal and unpatriotic organization. Adherents thereof owe no allegiance to any organized Government, preaching as they do rebellion under the red flag of anarchy. Their purpose is to stir up strife, breed discord, agitate strikes and overthrow all

legally constituted governments. The character of this organization is well known, especially on the Pacific Coast, where by its lawlessness, it has become an outlaw.

It is to such an organization as this that Neil Guiney, the appellant, owes allegiance. While gladly reaping the benefits of American protection, he harbors in his heart, the love of a flag, that does not contain the red, white and the blue, or even the colors of the land of his nativity, but the international Red Flag—the flag of anarchy, strife and discord. The followers of this flag are taught that the law of the land was not made for them and that they exist only to be overthrown. The property of others is merely held for them to seize, to destroy as they will. In this movement, Neil Guiney is one of the leaders.

Those who cannot, or will not, live the life of Americans under our institutions, and are unwilling to abide by the methods which we have established for the improvement of those institutions from time to time, should be sent back to the countries from which they came.

We therefore earnestly contend that Neil Guiney, the alien, who came to this country,

seeking and securing its protection, lost and forfeited it, when he became an active member and leader of the I. W. W., teaching and advocating, through its pernicious propaganda, the unlawful destruction of property. Against such an alien, the Government of the United States owes a duty of protection to its law-abiding citizens, and, with that thought in view, did, under its sovereign powers of self preservation, enact the Immigration Act which it has here invoked by this order of deportation.

Neil Guiney, the alien, has had a fair and impartial hearing. The Secretary of Labor has found him guilty of the charge upon which his warrant of arrest was based. The record is amply sufficient to support the charge. We therefore respectfully submit that the order of deportation should not now be stayed.

BERT. E. HANEY,
United States Attorney for Oregon.

BARNETT H. GOLDSTEIN,
Asst. United States Attorney for Oregon.

No. 3385

United States
Circuit Court of Appeals
For the Ninth Circuit.

HENRY ALBERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States Circuit Court of Appeals for the Ninth Circuit.

HENRY ALBERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Names and Addresses of the Attorneys of Record.

Mr. HENRY E. McGINN and Mr. R. CITRON, Oregonian Building, Portland Oregon, and VEAZIE, McCOURT and VEAZIE, Corbett Building, Portland Oregon,

For the Plaintiff in Error.

Mr. BERT E. HANEY, United States Attorney, and Mr. BARNETT H. GOLDSTEIN, Assistant United States Attorney, Old Post Office Building, Portland, Oregon,

For the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To United States of America GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the

District of Oregon, wherein Henry Albers is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 22d day of May, in the year of our Lord, one thousand nine hundred and nineteen.

CHAS. E. WOLVERTON,
Judge. [1*]

Due service of within citation hereby acknowledged this 22d day of May, 1919.

BARNETT H. GOLDSTEIN,
Asst. U. S. Atty.

[Endorsed]: No. 8159. United States District Court, District of Oregon. United States of America vs. Henry Albers. Citation on Writ of Error. Filed in the U. S. District Court, District of Oregon. Filed May 22, 1919. By G. H. Marsh, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HENRY ALBERS,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

*Page number appearing at foot of page of original certified Transcript of Record.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between United States of America, plaintiff and defendant in error, and Henry Albers, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 22 day of May, 1919.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By F. S. BUCK,
Deputy. [2]

Service of the foregoing Writ of Error made this 22d day of May, 1919, upon the District Court of the United States for the District of Oregon, by filing with me, as clerk of said court, a duly certified copy of said writ of error.

G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By F. S. BUCK,
Deputy.

[Endorsed]: No. 8159. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Henry Albers, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed May 22, 1919. G. H. Marsh, Clerk, United States District Court, District of Oregon. By F. S. Buck, Deputy Clerk.

In the District Court of the United States for the District of Oregon.

JULY TERM, 1918.

BE IT REMEMBERED, That on the 2d day of November, 1918, there was duly filed in the District

Court of the United States for the District of Oregon an indictment, in words and figures as follows, to wit: [3]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Indictment for Violation of Section 3, Title 1 of the Espionage Act and as Amended by the Act of Congress Approved May 16, 1918.

United States of America,
District of Oregon,—ss.

The Grand Jurors of the United States of America for the District of Oregon, duly impaneled, sworn and charged to inquire within and for said district, upon their oaths and affirmations do find, charge, allege and present:

COUNT ONE.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States then was and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided.

That Henry Albers, the above-named defendant, on, to wit, the 8th day of October, 1918, in the State and District of Oregon, and within the jurisdiction of this Court, and more particularly while traveling as a passenger upon a Southern Pacific Railroad train en route to Portland, in the State of Oregon, and passing at a point between Grants Pass and Roseburg, in said State and District of Oregon, then and there being, did wilfully, knowingly, unlawfully and feloniously cause, and [4] attempt to cause, incite, and attempt to incite, insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, to wit, men of registration age and subject to and eligible for draft and conscription, under the provisions of the Act of Congress approved May 18, 1917, known as the "Selective Service Law" and the amendment thereto approved August 31, 1918, by then and there stating, declaring, debating and agitating to, and in the presence of such men, and in particular L. W. Kinney, L. E. Gamaunt, J. A. Mead, E. C. Bendixen, F. B. Tichenor, and others to the Grand Jurors unknown, the said named persons then and there being of registration age and subject to draft and conscription, as aforesaid, in substance and to the effect as follows, to wit:

1. I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser [meaning William II, German Emperor] and I would go back to Germany tomorrow."

3. "I came here [meaning the United

States] without anything and I could go away without anything."

4. "I came to this country [meaning the United States] supposing it was a free country but I find that it is not as free as Germany."

5. "McAdoo [meaning W. G. McAdoo, then and there Secretary of the Treasury of the United States] is a son-of-a-bitch. Why should this Government tell me what to do?"

6. "I am a pro-German; so are my brothers."

7. "A German can never be beaten by a Yank [meaning an American]."

8. "You [meaning the United States] can never lick the Kaiser [meaning William II., German Emperor]—never in a thousand years."

9. "There will be a revolution in this country [meaning the United States] in ten years—yes, in two—maybe tomorrow."

10. "I could take a gun myself and fight right here [meaning in the United States]." [5]

11. "To hell with America."

12. "I have helped Germany in this war, and I would give every cent I have to defeat the United States."

13. "We [meaning Germany] have won the war."

and other statements of a like nature but expressed in language too filthy, vulgar and indecent to be spread upon the records of this Honorable Court, all of which said statements, so made by the said defendant as aforesaid, were then and there wilfully made by him, the said defendant, with the intent then and

there on the part of him, the said defendant, to cause, and attempt to cause, incite, and attempt to incite, insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, at a time when the United States was then and there in a state of war with the Imperial German Government, as he, the said defendant, then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT TWO.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States then was and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided.

That Henry Albers, the above-named defendant, on, to wit, [6] the 8th day of October, 1918, in the State and District of Oregon, and within the jurisdiction of this court, and more particularly while traveling as a passenger upon a Southern Pacific Railroad train en route to Portland, in the State of Oregon, and passing at a point between Grants Pass and Roseburg, in said State and District of Oregon, then and there being, did wilfully,

knowingly, unlawfully and feloniously obstruct, and attempt to obstruct, the recruiting and enlistment service of the United States, by then and there stating, declaring, debating and agitating to, and in the presence of L. W. Kinney, L. E. Gamaunt, J. A. Mead, E. C. Bendixen, F. B. Tichenor, and others to the Grand Jurors unknown, the said named persons then and there being eligible and qualified to enlist in the service of the United States, in substance and to the effect following, to wit:

1. "I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser [meaning William II, German Emperor] and I would go back to Germany tomorrow."

3. "I came here [meaning the United States] without anything and I could go away without anything."

4. "I came to this country [meaning the United States] supposing it was a free country but I find that it is not as free as Germany."

5. "McAdoo [meaning W. G. McAdoo, then and there Secretary of the Treasury of the United States] is a son-of-a-bitch. Why should this Government tell me what to do?"

6. "I am a pro-German; so are my brothers."

7. "A German can never be beaten by a Yank [meaning an American].

8. "You [meaning the United States] can never lick the Kaiser [meaning William II., German Emperor]—never in a thousand years."

9. "There will be a revolution in this country [meaning the United States] in ten years—yes, in two—maybe tomorrow." [7]

10. "I could take a gun myself and fight right here [meaning in the United States]."

11. "To hell with America."

12. "I have helped Germany in this war, and I would give every cent I have to defeat the United States."

13. "We [meaning Germany] have won the war."

and other statements of a like nature, but expressed in language too vulgar, filthy and indecent to be spread upon the records of this Honorable Court; all of which said statements, so made by the said defendant, as aforesaid, were then and there wilfully made by the said defendant with the intent, then and there, on the part of him, the said defendant, to obstruct, and attempt to obstruct, the recruiting and enlistment service of the United States, at a time when the United States was then and there in a state of war with the Imperial German Government, as aforesaid, as he, the said defendant, then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT THREE.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this in-

dictment, the United States then was and now is at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided.

That Henry Albers, the above-named defendant, on to wit, [8] the 8th of October, 1918, in the State and District of Oregon, and within the jurisdiction of this court, and more particularly while traveling as a passenger upon a Southern Pacific Railroad train en route to Portland, in the State of Oregon, and passing at a point between Grants Pass and Roseburg, in said State and District of Oregon, then and there being, did wilfully, knowingly, unlawfully and feloniously utter language intended to incite, provoke and encourage resistance to the United States, and to promote the cause of its enemies, by then and there stating and declaring to, and in the presence of L. W. Kinney, L. E. Gamaunt, J. A. Mead, E. C. Bendixen, F. B. Tichenor, and others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, to wit:

1. "I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser [meaning William II, German Emperor] and I would go back to Germany tomorrow."

3. "I came here [meaning the United States]

without anything and I could go away without anything."

4. "I came to this country [meaning the United States] supposing it was a free country but I find that it is not as free as Germany."

5. "McAdoo [meaning W. G. McAdoo, then and there Secretary of the Treasury of the United States] is a son-of-a-bitch. Why should this Government tell me what to do?"

6. "I am a pro-German; so are my brothers."

7. "A German can never be beaten by a Yank [meaning an American].

8. "You [meaning the United States] can never lick the Kaiser [meaning William II, German Emperor]—never in a thousand years."

9. "There will be a revolution in this country [meaning the United States] in ten years—yes, in two—maybe tomorrow." [9]

10. "I could take a gun myself and fight right here [meaning in the United States]."

11. "To hell with America."

12. 'I have helped Germany in this war, and I would give every cent I have to defeat the United States."

13. "We [meaning Germany] have won the war."

and other statements of a like nature, but expressed in language too vulgar, filthy and indecent to be spread upon the records of this Honorable Court; all of which statements so made by the defendant, as aforesaid, were then and there wilfully made by the said defendant, as aforesaid, with the intent, then and

there, on the part of him the said defendant, to incite, provoke and encourage resistance to the United States, and to promote the cause of its enemies, at a time when the United States was then and there in a state of war with the Imperial German Government, as aforesaid, as he, the said defendant, then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege, and present:

COUNT FOUR.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States then was and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided. [10]

That Henry Albers, the above-named defendant, on, to wit, the 8th day of October, 1918, in the State and District of Oregon, and within the jurisdiction of this court, and more particularly while travelling as a passenger upon a Southern Pacific Railroad train en route to Portland, in the State of Oregon, and passing at a point between Grants Pass and Roseburg, in said State and District of Oregon, then and there being, did wilfully, knowingly, unlawfully and feloniously support and favor the cause of a country

with which the United States was then and there at war, to wit, the Imperial German Government, and oppose the cause of the United States therein, by then and there stating to and in the presence of L. W. Kinney, L. E. Gamaunt, J. A. Mead, E. C. Bendixen, F. B. Tichenor, and others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, to wit:

1. "I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser [meaning William II, German Emperor], and I would go back tomorrow."

3. "I came here [meaning the United States], without anything and I could go away without anything."

4. "I came to this country [meaning the United States] supposing it was a free country but I find that it is not as free as Germany."

5. "McAdoo [meaning W. G. McAdoo, then and there Secretary of the Treasury of the United States] is a son-of-a-bitch. Why should this Government tell me what to do?"

6. "I am a pro-German; so are my brothers."

7. "A German can never be beaten by a Yank [meaning an American]."

8. "You [meaning the United States] can never lick the Kaiser [meaning William II, German Emperor]—never in a thousand years."

9. "There will be a revolution in this country [11] [meaning the United States], in ten years—yes, in two—maybe tomorrow."

10. "I could take a gun myself and fight right here [meaning the United States]."

11. "To hell with America."

12. I have helped Germany in this war, and I would give every cent I have to defeat the United States."

13. "We [meaning Germany] have won the war."

and other statements of a like nature, but expressed in language too vulgar, filthy and indecent to be spread upon the records of this Honorable Court.

And so, the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do find, charge, allege and present, *tht* said defendant, Henry Albers, at the time and place aforesaid, and in the manner aforesaid, did, by word, support and favor the cause of a country with which the United States was then and is now at war, to wit, the Imperial German Government, and oppose the cause of the United States therein; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT FIVE.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States was then and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly

declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided. **[12]**

That Henry Albers, the above-named defendant, on, to wit, between the 1st day of July, 1917, and the 1st day of May, 1918, the exact date and dates thereof being to the Grand Jurors unknown, at the city of Portland, in the State and district of Oregon, and within the jurisdiction of this court, then and there being, did knowingly, unlawfully, wilfully and feloniously make and convey false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies, by stating and declaring to, and in the presence of, one N. F. Titus, and to others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, *as follows,* to wit:

1. That all reports of the German atrocities (meaning thereby the reports of atrocities then being and having theretofore been committed by Germany, in Belgium, France and on the high seas by its military and naval forces, while Germany was then at war with the United States) were lies and nothing but lies;

2. That the United States and the citizens thereof are dominated by the English press;

3. That the United States Food Administration was organized and managed improperly, was wrong, outrageous, and no good;

4. That the United States had no cause to attack Germany;

all of which said reports and statements were false and untrue as he, the said defendant, then and there well knew, and all of which said false reports and false statements were so then and there wilfully made by the said defendant with the intent and purpose on the part of him, the said defendant, to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies, at a time when the United States was then and there in a state of [13] war with the Imperial German Government, as he, the said defendant, then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT SIX.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States then was and is now at war with the Imperial Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided.

That Henry Albers, the defendant above named, on, to wit, between the 1st day of July, 1917, and the

1st day of May, 1918, the exact date and dates thereof being to the Grand Jurors unknown, at the city of Portland, in the State and District of Oregon, and within the jurisdiction of this Court, then and there being, did knowingly, unlawfully, wilfully and feloniously cause, and attempt to cause, insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, to the injury of the service and of the United States, by stating, declaring, debating and agitating to, and in the presence of, one N. F. Titus, and to others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, to wit: **[14]**

1. That all reports of the German atrocities (meaning thereby the reports of the atrocities then being, and having theretofore been, committed by Germany, in Belgium, France and on the high seas by its military and naval forces, while Germany was then at war with the United States) were lies and nothing but lies;

2. That the United States and the citizens thereof are dominated by the English press;

3. That the United States Food Administration was organized and managed improperly; was wrong, outrageous, and no good;

4. That the United States had no cause to attack Germany;

5. That this country (meaning thereby the United States) could never lick the Kaiser (meaning thereby William II, German Emperor) in a thousand years;

6. That all the institutions of the United

States (meaning thereby the Government of the United States) were inferior to the institutions of Germany (meaning thereby the Government of Germany);

7. That the United States was up against a hard proposition when it attacked Germany (meaning thereby that the United States would be unable to defeat Germany in the present war); that the American soldiers were mere amateurs while the German soldiers were professionals;

8. That he (meaning thereby the said defendant) did not like the institutions of this country; that Germany was a better country to live in, and was a country where people enjoyed life;

9. That he (meaning thereby the said defendant) had lived in Germany twenty-five years, and that he preferred that country to this (meaning the United States);

10. That there was going to be a revolution in the United States; that the people of this country (meaning the United States) were living on a volcano; that something was liable to happen at any time and that the people of this country had better look out;

all of which said statements so made by the said defendant as aforesaid were then and there wilfully made by him, the said defendant, with the intent and purpose then and there on the part of him, the said defendant, to cause, and attempt to cause, insubordination, disloyalty, mutiny and refusal of duty

in the [15] military and naval forces of the United States to the injury of the service and of the United States; he, the said N. F. Titus, then and there being a male person subject to and eligible for service in the military and naval forces of the United States, at a time when the United States was then and there in a state of war with the Imperial German Government, as he, the said defendant, then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT SEVEN.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States then was and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided.

That Henry Albers, the above-named defendant, on, to wit, between the 1st day of July, 1917, and the 1st day of May, 1918, the exact date and dates thereof being to the Grand Jurors unknown, at the city of Portland, in the State and District of Oregon, and within the jurisdiction of this Court, then and there being, did knowingly, unlawfully, wilfully and feloniously obstruct, the recruiting and enlistment service

of the United States, to the injury of the service and of the United States, by then and there stating, declaring, debating and agitating to **[16]** and in the presence of, one N. F. Titus, and to others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, to wit:

1. That all reports of the German atrocities (meaning thereby the reports of the atrocities then being, and having theretofore been, committed by Germany, in Belgium, France and on the high seas by its military and naval forces, while Germany was then at war with the United States) were lies and nothing but lies.

2. That the United States and the citizens thereof are dominated by the English press;

3. That the United States Food Administration was organized and managed improperly; was wrong, outrageous, and no good;

4. That the United States had no cause to attack Germany;

5. That this country (meaning thereby the United States) could never lick the Kaiser (meaning thereby William II, German Emperor) in a thousand years;

6. That all the institutions of the United States (meaning thereby the Government of the United States) were inferior to the institutions of Germany (meaning thereby the Government of Germany);

7. That the United States was up against a hard proposition when it attacked Germany (meaning thereby that the United States would

be unable to defeat Germany in the present war); that the American soldiers were mere amateurs while the German soldiers were professionals;

8. That he (meaning thereby the said defendant) did not like the institutions of this country; that Germany was a better country to live in, and was a country where people enjoyed life;

9. That he (meaning thereby the said defendant) had lived in Germany twenty-five years, and that he preferred that country to this (meaning the United States);

10. That there was going to be a revolution in the United States; that the people of this country (meaning the United States) were living on a volcano; that something was liable to happen a any time and that the people of this country had better look out;

all of which said statements so made by said defendant, as aforesaid, were then and there wilfully made by him, the said defendant, with the intent and purpose then and there on the part of [17] him, the said defendant, to obstruct the recruiting and enlistment service of the United States, to the injury of the service and of the United States; he, the said N. F. Titus, then and there being a male person eligible for enlistment service in the United States military and naval forces, at a time when the United States was then and there at war with the Imperial German Government, as he, the said defendant, then and there well knew; contrary to the form of the

statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 2d day of Nov., 1918.

(Signed) B. E. HANEY,
United States Attorney.

A true bill.

(Signed) CARL H. JACKSON,
Foreman United States Grand Jury.

[Endorsed]: A True Bill. Carl H. Jackson, Foreman Grand Jury. B. E. Haney, U. S. Attorney. Filed in open court. Nov. 2, 1918. G. H. Marsh, Clerk. K. F. Frazer, Deputy. **[18]**

AND AFTERWARDS, to wit, on Friday, the 22d day of November, 1918, the same being the 17th judicial day of the regular November term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: **[19]**

In the District Court of the United States for the District of Oregon.

No. 8159.

November 22, 1918.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Arraignment.

INDICTMENT: ESPIONAGE ACT.

Now, at this day, come the plaintiff by Mr. Barnett

H. Goldstein, Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Henry E. McGinn, of counsel. Whereupon said defendant is duly arraigned upon the indictment herein. **[20]**

AND AFTERWARDS, to wit, on the 15th day of January, 1919, there was duly filed in said court a demurrer to indictment, in words and figures as follows, to wit: **[21]**

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY ALBERS,

Defendant.

Demurrer to Indictment.

Comes now the defendant, Henry Albers, and demurs to the indictment herein filed against him as follows:

FIRST. Defendant demurs to Count One of said indictment for the following reasons: (1) That said indictment does not state facts sufficient to constitute a crime against the laws of the United States and does not state facts sufficient to charge a crime against this defendant. (2) That section III of the Act of Congress, approved June 15, 1917, commonly known as the Espionage Act, as amended by Act of Congress, May 16, 1918, upon which said

Count One of said indictment is based, is in conflict with and violates Article I of the Amendments to the Constitution of the United States.

SECOND. Defendant demurs to Count Two of said indictment for the following reasons: (1) That said Count Two of said indictment does not state facts sufficient to constitute a crime against the laws of the United States and does not state facts sufficient to charge a crime against the defendant. (2) That the Act of Congress, approved June 15, 1917, commonly known as the Espionage Act, and particularly Section III thereof, as amended by Act of Congress May 16, 1918, upon which said Count Two of said indictment is based, is in direct conflict **[22]** with and violates Article I of the Amendments to the Constitution of the United States.

THIRD. Defendant demurs to Count Three of said indictment, for the following reasons: (1) That said Count Three of said indictment does not state facts sufficient to constitute a crime against the laws of the United States, or to charge a crime against this defendant. (2) That said Count Three of said indictment is duplicitous in this: that it is attempted therein to charge two crimes against the defendant, to wit: The crime of uttering language intended to incite, provoke and encourage resistence to the United States and also the crime of uttering language intended to promote the cause of the enemies of the United States; the two offences mentioned being separate and distinct offences denounced by said statute, upon which said indictment is apparently based. (3) That the Act of Congress, approved

June 15, 1917, commonly known as the Espionage Act, and particularly section III thereof, as amended by the Act of May 16, 1918, is in conflict with and violates Article I of the Amendments to the Constitution of the United States.

FOURTH. Defendant demurs to Count Four of said indictment, for the following reasons: (1) That said Count Four of said indictment does not state facts sufficient to constitute a crime against the laws of the United States and does not state facts sufficient to charge a crime against the defendant. (2) That said Count Four of said indictment attempts to charge two separate and distinct offences; it charges that the defendant did wilfully, etc., support and favor the cause of the country with which the United States was then and there at war, which is a complete offence under the statutes. Count Four also charges that the defendant did wilfully, etc., oppose the cause [23] of the United States in said war, which is also a complete offence under the statutes. Said count of said indictment is therefore duplicitous. (3) That the Act of Congress, approved June 15, 1917, commonly known as the Espionage Act, and particularly section III thereof, as amended by the Act of May 16, 1918, is in conflict with and violates Article I, of the amendment to the Constitution of the United States.

FIFTH. Defendant demurs to Counts Five, Six, and Seven of said indictment for the following reasons:

(1) That neither of said last-mentioned counts state facts sufficient to constitute a crime against the

laws of the United States, or to charge a crime against the defendant.

(2) That the Act of Congress of May 16, 1918, amending section 3 of the Espionage Act had the effect of repealing section 3 of said Act as the same existed in the original Act. Each of said Counts Five, Six and Seven of the indictment attempt to charge a crime as denounced by section 3 of the Act of June 15, 1917 (Espionage Act), which Act had ceased to exist at the time said indictment was returned and found.

(3) That the Act of Congress approved June 15, 1917, commonly known as the Espionage Act, upon which each of said Counts Five, Six and Seven of said indictment purport to be based, is in conflict with and violates Article I of the amendments to the Constitution of the United States, as likewise does section 3 of said Act as amended by the Act of May 16, 1918.

(Signed) HENRY E. McGINN,
JOHN McCOURT,
R. CITRON,
Attorneys for Defendant. [24]

United States of America,
District of Oregon,—ss.

I, John McCourt, hereby certify that I am one of defendant's attorneys; that I have carefully examined the indictment to which the foregoing demurrer is directed, and I believe that the demurrer is well founded, and that the same is not made for purposes of delay.

(Signed) JOHN McCOURT.

District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy, admitted at Portland, Oregon, this 14th day of January, 1919.

_____,
Attorney for Plaintiff.

Filed January 15, 1919. G. H. Marsh, Clerk. By K. F. Frazer, Deputy. [25]

AND AFTERWARDS, to wit, on Thursday, the 16th day of January, 1919, the same being the 62d judicial day of the regular November term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [26]

In the District Court of the United States for the District of Oregon.

No. 8159.

January 16, 1919.

THE UNITED STATES OF AMERICA
vs.
HENRY ALBERS.

Order Overruling Demurrer, etc.

INDICTMENT:

Section 3, Title 1, Espionage Act.

Now, at this day, come the plaintiff by Mr. Barnett H. Goldstein, Assistant United States Attorney, and

the defendant in his own proper person and by Mr. John McCourt, of counsel. Where upon this cause comes on to be heard by the Court upon the demurrer of the defendant to the indictment herein, and the Court now being fully advised in the premises—

IT IS ORDERED that said demurrer be and the same is hereby overruled, whereupon upon motion of said defendant for postponement of the trial of this cause

IT IS ORDERED that said motion be and the same is hereby denied. Whereupon said defendant for plea to the indictment herein says he is not guilty as charged in said indictment. [27]

AND AFTERWARDS, to wit, on Tuesday, the 28th day of January, 1919, the same being the 72d judicial day of the regular November term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [28]

In the District Court of the United States for the District of Oregon.

No. 8159.

January 28, 1919.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Trial.

INDICTMENT:

Section 3, Title 1, Act of May 16, 1918.

Now, at this day, come the plaintiff by Mr. Bert E. Haney, United States Attorney, and Mr. Barnett H. Goldstein, Assistant United States Attorney, and the defendant in his own proper person and by his counsel as of yesterday, whereupon the Court proceeds to select the jury. And thereupon now come the following named jurors to try the issues joined, viz: J. J. Van Kleek, T. J. Elliott, Arthur E. Hastings, Benjamin F. Holman, Frank W. Bartholomew, John Frye, George P. Litchfield, Harry Ball, Walter A. Durham, George Thyng, Carl Fisher and William Larsen, twelve good and lawful men of the district, who, being accepted by both parties, are duly impaneled and sworn. And the hour of adjournment having arrived, the further trial of this cause is continued to to-morrow, Wednesday, January 29, 1919. [29]

AND AFTERWARDS, to wit, on the 1st day of February, 1919, there was duly filed in said court a motion of defendant for directed verdict, in words and figures as follows, to wit: [30]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Motion for Directed Verdict.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 1 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 1 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 3 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 4 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 5 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 6 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and re-

turn a verdict herein of not guilty on Count 7 of the indictment.

(Signed) HENRY E. McGINN,
RALPH CITRON,
JOHN McCOURT,
Attorneys for Defendant.

Filed Feb. 1, 1919. G. H. Marsh, Clerk. By K. F. Frazer, Deputy. [31]

AND AFTERWARDS, to wit, on Saturday, the 1st day of February, 1919, the same being the 76th judicial day of the regular November term of said Court—Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [32]

In the District Court of the United States for the District of Oregon.

No. 8159.

February 1, 1919.

THE UNITED STATES OF AMERICA
vs.
HENRY ALBERS.

Order Denying Motion for Directed Verdict.

INDICTMENT:

Section 3, Title 1, Espionage Act as Amended by Act of May 16, 1918.

Now, at this day, come the plaintiff by Mr. Bert E. Haney, United States Attorney, and Mr. Barnett

H. Goldstein, Assistant United States Attorney, and the defendant in his own proper person and by his counsel as of yesterday. Whereupon the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. And thereupon the defendant above named moves the Court for a directed verdict of not guilty in his own behalf upon each and every count of the indictment herein. Upon consideration whereof

IT IS ORDERED that said motion be and the same is hereby denied. And the said jury having heard the evidence adduced, and the hour of adjournment having arrived, the further trial of this cause is continued to Monday, February 3, 1919, at two o'clock P. M. [33]

AND AFTERWARDS, to wit, on Wednesday, the 5th day of February, 1919, the same being the 79th judicial day of the regular November term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [34]

In the District Court of the United States for the District of Oregon.

No. 8159.

February 5, 1919.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Trial (Continued).

INDICTMENT:

Section 3, Title 1, Espionage Act, as Amended.

Now, at this day, come the plaintiff by Mr. Bert E. Haney, United States Attorney, and Mr. Barnett H. Goldstein, Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. John McCourt and Mr. Raphael Citron, of counsel. Whereupon the jury impaneled herein come into court, answer to their names and return to the Court the following verdict, viz:

"We, the Jury duly impaneled to try the above-entitled cause, do find the defendant, Henry Albers, not guilty as charged in Count One of the Indictment and not guilty as charged in Count Two of the Indictment, and guilty as charged in Count Three of the Indictment, aud guilty as charged in Count Four of the Indictment, and not guilty as charged in Count Five of the Indictment, and not guilty as charged in Count Six of the Indictment, and not guilty as charged in Count Seven of the Indictment herein.

Dated at Portland, Oregon, this 4 day of February, 1919.

B. F. HOLMAN,
Foreman."

Whereupon, upon motion of said defendant, IT IS ORDERED that the said jury be polled, and thereupon each of said jurors in answer to his name for himself says that the said verdict is his verdict. And thereupon said verdict is received by the Court

and ordered to be filed. Whereupon upon [35] motion of said defendant,

IT IS ORDERED that he be and he is hereby allowed thirty days from this date within which to file a motion to set aside the verdict herein, and for a new trial and a motion in arrest of judgment, and ninety days from this date to prepare and submit his bill of exceptions, and

IT IS FURTHER ORDERED that the bail of said defendant heretofore given stand as the bail of said defendant until the further order of the Court. [36]

AND AFTERWARDS, to wit, on the 5th day of February, 1919, there was duly filed in said court a verdict, in words and figures as follows, to wit: [37]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Verdict.

We, the jury impaneled to try the above-entitled cause, do find the defendant, Henry Albers, not guilty as charged in Count One of the Indictment, and not guilty as charged in Count Two of the Indictment, and guilty as charged in Count Three of the Indictment, and guilty as charged in Count Four

of the Indictment, and not guilty as charged in Count Five of the Indictment, and not guilty as charged in Count Six of the Indictment, and not guilty as charged in Count Seven of the Indictment herein.

Dated at Portland, Oregon, this 4 day of February, 1919.

(Signed) B. F. HOLMAN,
Foreman.

Filed Feb. 5, 1919. G. H. Marsh, Clerk. By K. F. Frazer, Deputy. [38]

AND AFTERWARDS, to wit, on the 17th day of March, 1919, there was duly filed in said court a motion in arrest of judgment, in words and figures as follows, to wit: [39]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Motion in Arrest of Judgment.

Comes now the defendant and moves this Honorable Court for an order herein arresting judgment upon the verdict returned by the jury in the above-entitled cause upon Count 3 of the indictment and for an order arresting judgment upon Count 4 of the indictment, for the following reasons:

I.

That said Count 3 of the indictment does not state

a crime against the defendant.

II.

That said Count 3 of the indictment is duplicitous in that two offenses are attempted to be stated therein.

III.

That the evidence offered by the Government to prove the charges set forth in Count 3 of the indictment was wholly insufficient to prove the crime charged therein.

IV.

That said Count 4 of the indictment does not state a crime against the defendant.

V.

That said Count 4 of the indictment is duplicitous in that two offenses are attempted to be stated therein.

VI.

That the evidence offered by the Government to prove the charges set forth in Count 4 of the indictment was wholly [40] insufficient to prove the crime charged therein.

(Signed) HENRY E. McGINN,
RALPH CITRON,
JOHN McCOURT,
Attorneys for Defendant.

Due service of the foregoing motion is hereby admitted in Multnomah County, Oregon, this 17th day of March, 1919, by receiving a copy thereof, duly certified to as such by John McCourt, one of the attorneys for defendant.

(Signed) B. E. HANEY,
Attorney for Plaintiff.

Filed March 17, 1919. G. H. Marsh, Clerk. By K. F. Frazer, Deputy. [41]

AND AFTERWARDS, to wit, on Monday, the 17th day of March, 1919, the same being the 13th judicial day of the regular March term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [42]

In the District Court of the United States for the District of Oregon.

No. 8159.

March 17, 1919.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Sentence.

INDICTMENT: ESPIONAGE ACT.

Now, at this day, this cause comes on to be heard upon the motion of the defendant to set aside the verdict and for a new trial herein, said plaintiff appearing by Mr. Bert E. Haney, United States Attorney, and Mr. Barnett H. Goldstein, Assistant United States Attorney, and the defendant in his own proper person and by Mr. Henry E. McGinn and Mr. John McCourt, of counsel. Upon consideration whereof

IT IS ORDERED that said motion be and the same is hereby overruled.

Whereupon said defendant files a motion in arrest of judgment. And upon consideration thereof it is ORDERED that said motion be and the same is hereby denied. Whereupon, upon motion of said plaintiff for judgment upon the verdict herein

IT IS ADJUDGED that said defendant do pay a fine of $10,000.00, and that he be imprisoned in the United States Penitentiary at McNeil Island, Washington, for the term of three years, and that he stand committed until this sentence be performed or until he be discharged according to law. Whereupon, upon motion of said defendant, it is ORDERED that he be and he is hereby allowed ninety days from February 5, 1919, within which to prepare and submit his bill of exceptions herein, and it is ORDERED that execution of this sentence be stayed until that date. [43]

AND AFTERWARDS, to wit, on the 22d day of May, 1919, there was duly filed in said court, a petition for writ of error, in words and figures as follows, to wit: [44]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA.

vs.

HENRY ALBERS,

Defendant.

Petition for Writ of Error.

Your petitioner, Henry Albers, defendant in the

above-entitled cause, now comes and brings this, his petition as plaintiff in error, for a writ of error to the District Court of the United States for the District of Oregon, and thereupon your petitioner shows:

That on the 17th day of March, 1919, there was rendered and entered in the above-entitled cause a judgment in and by said District Court of the United States for the District of Oregon, wherein and whereby your petitioner was sentenced and adjudged to be imprisoned in the United States Penitentiary at McNeil's Island for a period of three (3) years and to pay a fine of Ten Thousand ($10,000.00) Dollars.

And your petitioner further shows that he is advised by counsel that there are manifest errors in the records and proceedings at and in said cause in the rendition of said judgment and sentence, to the great damage of your petitioner, all of which errors will be made to appear by examination of the said record and more particularly be an examination of the bill of exceptions by your petitioner tendered and filed herein and in the assignments of error filed and tendered herewith.

To the end, therefore, that the said judgment, sentence and proceedings may be reversed by the United States [45] Circuit Court of Appeals of the Ninth Circuit, your petitioner prays that a writ of error may be issued, directed therefrom to the said District Court of the United States for the District of Oregon, returnable according to law, and the practice of this Court, and that there may be directed to be returned pursuant thereto a true copy of the record,

bill of exceptions, assignments of error and all proceedings had in said cause; that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the errors, if any have happened, may be fully corrected, and full and speedy justice done your petitioner.

And your petitioner now makes his assignments of error filed herewith upon which he will rely, and which will be made to appear by the return of said record in obedience to said writ.

WHEREFORE, your petitioner prays the issuance of a writ as hereinbefore prayed for, and prays that his assignments of error filed herewith may be considered as his assignments of error upon the writ, and that the judgment rendered in this cause may be reversed and held for naught and said cause remanded for further proceedings, and also that an order be made fixing the amount of security which the said petitioner shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court against the said petitioner be suspended and stayed until the determination of the said writ of error in the said Circuit Court of Appeals.

(Signed) HENRY E. McGINN,
VEAZIE, McCOURT & VEAZIE,
Attorneys for Petitioner. [46]

State of Oregon,
County of Multnomah,—ss.

Due service of the within Petition for Writ of Error is hereby accepted in Multnomah County, Oregon, this 22d day of May, 1919, by receiving a copy

thereof duly certified to as such by A. L. Veazie, one of defendant's attorneys.

(Signed) BARNETT H. GOLDSTEIN,
Asst. U. S. Atty.

Filed May 22, 1919. G. H. Marsh, Clerk. [47]

AND AFTERWARDS, to wit, on the 22d day of May, 1919, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [48]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

vs.

HENRY ALBERS,

Defendant.

Assignment of Errors.

Now comes the plaintiff in error, the defendant above named, by his counsel, and presents this assignment of errors, containing the assignment of errors upon which he will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and specifies the following particulars wherein it is claimed that the District Court erred in the course of the trial of said cause:

1. Error of the Court in overruling the demurrer of plaintiff in error to Count Three of the indictment, on the ground that the Act of Congress on which said count of the indictment is based is in violation of

Article I of the Amendments to the Constitution of the United States.

2. Error of the Court in overruling the demurrer of plaintiff in error to Count Four of the indictment, on the ground that the Act of Congress on which said count of the indictment is based is in violation of Article I of the Amendments to the Constitution of the United States.

3. Error of the Court in overruling the demurrer of plaintiff in error to Counts Three and Four in the indictment, upon the gound that the facts stated in each of said counts of said indictment are insufficient to constitute an offense.

4. Error of the Court in overruling the demurrer of [49] the plaintiff in error to Count Three of the indictment upon the ground that said count of the indictment is bad for duplicity.

5. Error of the Court in overruling the demurrer of the plaintiff in error to Count Four of the indictment upon the ground that said count of the indictment is bad for duplicity.

6. Error of the Court in overruling the objection of defendant to the testimony of Judson A. Mead, wherein he was asked the following question: Question: And from that point on, now, I wish you would just tell the jury what you saw or heard as between Mr. Gaumaunt and Mr. Albers at that conversation in the smoking-car; and if you joined in the conversation, state what you said, or what Mr. Albers said to you." And in permitting the witness to answer: He (witness) was merely

listening for the next few minutes. Every few minutes Mr. Albers made some remarks and there was nobody else talking. He says: "Well, I am German and don't deny it. They will never lick the Kaiser, not in a thousand years. Once a German, always a German."

7. Error of the Court in overruling the objection of defendant to the testimony of the witness Erwin C. Bendixen, wherein he was asked the following question by the United States Attorney: "Question: Just go ahead in your own way, without questions from me, and tell what conversation you had with Mr. Albers at that time, or what he said to anybody else while you were present." And in permitting the witness to answer that defendant made the remark, he said he was a German, he was nothing but German, always a German. He said it didn't make any difference to him how he expressed it, you might say, and he wanted to imply—this was in German—and he told witness [50] that on the outside, to the outside world, why, he was an American, but down in his heart he was a German, and when he made that remark witness knew that was a very seditious remark to make, and he said to defendant, "My goodness, you don't mean that!" He said, "You don't mean to say you would go to Germany and fight for the Kaiser?" Witness made that remark to him and defendant got up and said he would go back in the morning. He said he had served the Kaiser twenty-five years, and that America—he said, "I have served the Kaiser twenty-five years, and with America, shit, shit." That is just what he said to witness in German. Witness

knew that much of the conversation. He didn't exactly remember. He warned defendant all the time. That is what he was doing, he was warning defendant against saying those things. Then defendant told—he raved on, you might say, and he told witness he had ten million dollars and he would spend every cent of it to lick America. Then also in this conversation he made the remark, which is a very bad remark, in in the German language, it was the remark "Schlach America." "Schlach America," in the German language, he takes the word "schlach" means to obliterate. It means to do anything to you against the country. When a man says "schlach" in German he means "schlach you," he is going to get you. This is witness' translation and that is the way it appears to him. Then, after he saw defendant was of that character and he didn't care what remarks he had made, and would make any threat on us, witness walked out of the compartment and went back to Mr. Tichenor and told him the things that had been said, and Mr. Tichenor said, "Well, he has been saying that to all these men," and Mr. Tichenor said, "There must be some more to this." Defendant has been down in San Francisco and he must have been [51] conspiring down there, making a contract or something. Then he asked witness if he would not go back and see if he could get some more—some dope, as he called it, as to contracts or something defendant had been doing down in Frisco. Witness went at once and he talked to defendant and tried to talk to him about several different things and then asked defendant if he had had anything like that to

do—had done anything like that, and he said "no, he hadn't had anything to do like that. He said he looked at witness, you know, out of the corner of his eye, like that, "Nein, nein." You understand that means, "No, no," and he would not talk any more. During his talks with defendant, before that, there were one or two things that probably should be brought up in this case, in regard to that, after witness had introduced himself to him—why, he introduced himself in German, and defendant told him that—in German —"Du bist ein ecte Deutscher," or "You are a genuine German." Also during the conversation defendant told him that his brothers were also pro-Hun. Well, he said German, which means the same thing. He didn't say pro-Hun. He said German. He said they were German. He also told witness of some trouble, he knew of some trouble or revolution which would appear in the next ten years, yes, five years, yes, to-morrow, he said. After he told witness this "nein, nein," or "no, no," then defendant told witness that he wanted to go to bed, and he went up to the porter and told the porter he wanted to go to bed; then the witness went to the rear of the observation-car again. When he spoke about Germany winning this war he made the remark, "Wir haben Krieg gewonnen"; that means, "We have won the war." He expressed himself that he was willing to go back—he was going back in the morning. He told witness he had ten million dollars and that [52] he would spend every cent of it to whip America. Witness got off the train at Roseburg about an hour later. He reported to Mr. Tich-

enor what he had heard in that room and made a memorandum of it himself.

8. Error of the Court in overruling the objection of the defendant to the testimony of the witness Henry Cerrano, and permitting said witness to testify, over defendant's objection, as follows: Before October, 1915, I saw Mr. Albers once. He came in the office with a German-American paper and he gave this paper to a young gentleman who was working at a typewriter machine, and giving this paper he says, "Look at that paper; see what the German army is *going.* The German army is doing wonderful and France and England come very easy," and then Mr. Albers went away from that room and the only words I heard after that, I heard these two words, "One Kaiser and One God." I didn't understand well what he said before, if we were going to have one Kaiser and one God, or that we will have one Kaiser and one God, but, all what I am sure "One Kaiser and one God," I heard very well them two words.

9. Error of the Court in overruling the objection of the defendant to the testimony of the witness N. F. Titus, wherein the defendant was asked the following question: Question: "Now, Mr. Titus, what conversation did you have with Mr. Albers concerning the war, commencing about January or February, 1917, and running up to June 15, 1917?" And in permitting the witness to answer that the conversations he had with Mr. Albers were numerous and he was unable to fix any definite day during that entire period when any particular conversation took

place. He recalled very distinctly the nature and substance of the conversations, and, to begin with, the first point that came to the [53] mind of witness was the discussion of Belgium and other atrocities, this topic arising from the current newspaper comments. In discussing those features, that particular point with Mr. Albers, he uniformly made the statement that they were all lies and that the reason they got them in that shape was that the press of America was dominated by the English press, and that if we wished to get the truth of the situation we should read the German papers. He further discussed the trouble that the United States was having with Germany, the Imperial Government of Germany, respecting the various points at issue at that time, the exchange of notes which followed—and he believed—stated himself that the United States was misled in their position and the fact that they were misled was due to the influence of the British press and on numerous occasions emphasizing that point. Defendant frequently discussed the conditions in Germany, his visits over there, his great liking for the condition of living in Germany, the fact that the people there enjoyed life better than they do over here, and in discussing the life in Germany he frequently mentioned, or made comparisons between the institutions in this country and the institutions in Germany, laying particular emphasis on our forms of municipal government, speaking of our State government—its efficiency, etc., and in comparison of the national forms of government, and in every particular case in these comparisons emphasizing the

point that he liked the form of government in Germany better than he did over here, feeling that the forms of government here were maybe swayed by party action, political action, and selfish ends and that the German forms of government were more efficiently and more ably and more conscientiously administered. That occurred along the first part of the year 1917 on numerous occasions. Defendant [54] frequently mentioned at that time that the people in Germany enjoyed life more than they did over here. Well, the first thought that occurred to the mind of witness the first time defendant mentioned that was that he spoke of the convivial spirit of the people over there. He said they would go to a church on a Sunday morning. After church they could meet around at a little beer garden and sit around and play games and have a good time and he felt that the people there enjoyed life more than they did here. It was impossible, witness said, for him to tell whether these conversations took place in April, May, June or July, but the subject was up a number of times and defendant reverted back to the old primary consideration that defendant believed that we in this country were dominated by the British press. That seemed to be a particular hobby of his and he constantly referred to it and reverted to it, stating that we were misled by the British press and he felt that we were not justified in going to the length that we did in actually entering the war.

10. Error of the Court in overruling the objection of the defendant to the testimony of the witness David McKinnon, wherein he was asked the following

question: "Question: "Just state the conversation that took place concerning the war." And in permitting the witness to answer that in 1914 he had a conversation with the defendant wherein defendant said: "What do you think of our British cousins?" "Never mind; before we get through with them we will kill every man, woman and child in England."

11. Error of the Court in instructing the jury relative to the purpose and effect of the testimony sought to be elicited from the witness David McKinnon, while said witness [55] was on the stand, as follows: "This testimony is offered, not to prove the acts that are alleged against him constituting the offense, but to prove or to show, if the testimony has that effect, the intent or not the intent but the bent of the defendant's mind or his attitude towards this country and towards that of Germans, and it will only be admitted for that purpose and none other, and it is admitted bearing upon intent so that the jury is put into possession of the bent of mind or of the attitude of the defendant prior to the time when these acts are alleged to have been committed, to enable them better to say what his intent was and by considering all the testimony in the case, and I will admit it for that purpose. I will say to the jury now that this testimony is not admitted for the purpose of proving the allegations in the indictment or any of them by which this defendant is charged with the offenses therein stated, but it is admitted for this purpose and this purpose only as tending to show the bent of mind of the defendant or his attitude towards this country as compared with his bent of mind and

attitude towards the Imperial Government of Germany, and is for the purpose of aiding you, taking it in connection with all the testimony that will be offered in the case, to determine what his intent was if it be proven that he has made the statements which it is declared by the indictment he has made, and by taking this in connection with all the testimony in the case it will aid you in determining what his intent was in making such remarks or in making such statements as may be proven to your satisfaction beyond a reasonable doubt."

12. Error of the Court in overruling the objection of defendant to the testimony of the witness Eva T. Bendixen, [56] wherein she was asked the following question: Question: "Now, what conversation was had at that time, if any, between Mr. Nippolt and Mr. Bendixen and yourself concerning the Albers arrest or the Albers case or the charges against him?" And in permitting the witness to answer as follows: Answer: Well, the conversation came about regarding the case, and the fact that Henry Albers had made seditious remarks and that Mr. Bendixen had been asked to go in there and find out whether he really was a pro-Hun or not, and in regard to the matter about the drink it came up in this way: That he told Mr. Nippolt just how it came up, that he felt kind of, perhaps, that if Mr. Albers would offer him a drink it would be all right for him to take it; that he felt it was his American duty to go in there, if these remarks had been made, to see if it really was so; and he told also to Mr. Nippolt that it placed him in a very peculiar position because his uncle was in-

terested in the firm and that his first thought was probably he should wire his uncle and then again he thought it would bring a reflection in some way or other, that he better leave just everything alone."

13. Error of the Court in overruling the motion of the defendant to take from the jury and to strike out the testimony of the witness Horace A. Cushing as follows: He had a conversation with Mr. Albers in which defendant offered to make a bet with him concerning the outcome of the war. It was shortly after the Germans declared war against France and Great Britain. He offered to bet witness a thousand dollars to fifty cents, and loan witness the fifty cents, that the Kaiser could lick the world.

14. Error of the Court in overruling the motion of [57] defendant to take from the jury and to strike out the testimony of the witness John H. Noyes as follows: Yes, sir, as he recalled it, he made only two bets with Mr. Albers with respect to the outcome of the war. The first bet was made in November, 1914. It was a bet of ten dollars that the Germans would not be in London in sixty days. Mr. Albers bet that the Germans would be in London in sixty days. He knew one other bet that he recalled. That was in December, 1915, that the war would be over April 1, 1916. Mr. Albers said the war would be over April 1, 1916. One of these bets was paid, he didn't know which. Both of them were for ten dollars.

15. Error of the Court in refusing the request of the defendant to direct and instruct the jury to return a verdict of not guilty on Count Three of the indictment.

16. Error of the Court in refusing the request of the defendant to direct and instruct the jury to return a verdict of not guilty on Count Four of the indictment.

17. Error of the Court in refusing to give the following instruction:

The mere utterance or use of the words and statements set forth in the several counts of the indictment does not constitute an offense in any of said counts. Before a defendant is guilty of violating the statute by oral statements such statements must be made wilfully and with the specific intent made necessary by the statute, and such words and oral statements must be such that their necessary and legitimate consequence will produce the results forbidden by the statute.

18. Error of the Court in refusing to give the jury [58] the following instruction:

While it is a rule of law that every person is presumed to intend the necessary and legitimate consequences of what he knowingly does or says, the jury, however, has no right to fins a criminal intent from words spoken unless such intent is the necessary and legitimate consequence thereof. A jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inference than to find any other fact without evidence.

19. Error of the Court in refusing to give the jury the following instruction:

If you find from the evidence that F. B. Tichenor, a Deputy United States Marshal, and L. E. Gaumaunt, a deputy sheriff of a county in the State of

Washington, induced and incited, or lured the defendant on, to make the statements charged in the indictment under the circumstances under which it has been testified such statements were made, and that said officers thereby procured the defendant to make said statements, you should find the defendant not guilty upon each of the Counts 1, 2, 3 and 4 of the indictment.

20. Error of the Court in refusing to give the jury the following instruction:

If the defendant was intoxicated at the time of making any of the statements set forth in Counts 1, 2, 3 and 4 of the indictment, to such an extent that he could not deliberate upon or understand what he said, or have an intention to say what he did, you should find the defendant not guilty upon each of said Counts 1, 2, 3 and 4 of the indictment.

While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if upon the [59] while evidence in this case, by reason of defendant's intoxication (if you find he was intoxicated at the time), you have such reasonable doubt whether at the time of the utterance of the alleged language (if you find from the evidence defendant did utter said language) that defendant did not have sufficient mental capacity to appreciate and understand the meaning of said language and the use to which it was made; that there was an absence of purpose, motive or intent on his part to violate the Espionage Act at said time, then you cannot find him guilty upon Counts 1, 2, 3 and 4, although such in-

ability and lack of intent was the result of intoxication.

21. Error of the Court in refusing to give the jury the following instruction:

If the jury finds that the defendant made the statements alleged in Counts 1, 2, 3 and 4 of the indictment, and that said statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts 1, 2, 3 and 4.

22. Error of the Court in refusing to give the jury the following instruction:

Before you can find the defendant guilty under Count 3 of the indictment, you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements or the substance thereof alleged and set forth in that count of the indictment; second, that he made said statements wilfully and with the intention to incite, provoke or encourage resistance to the United States *and* to promote the cause of its enemies; and, third, that said statements, if you find beyond a reasonable doubt that any were [60] made, would naturally and legitimate incite, provoke or encourage resistance to the United States and promote the cause of its enemies.

23. Error of the Court in refusing to give the jury the following instruction:

Under the allegations of Count 3 of the indictment *it* the Government must prove to your satisfaction beyond a reasonable doubt, before you can find the defendant guilty, that the defendant wilfully in-

tended by the alleged statements both to incite, provoke and encourage resistance to the United States and to promote the cause of its enemies, and it will not be sufficient for the Government to prove that the defendant wilfully intended to bring about only one of such results.

24. Error of the Court in refusing to give the jury the following instruction:

The words "support," "favor," and "oppose" import wilfulness and intent, and it is alleged in the indictment that the statements set forth therein were made wilfully. Therefore before you could find the defendant guilty under Count 4 of the indictment, you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements as alleged in the indictment or in substance as alleged in the indictment; second, that the statements made by defendant, if you find beyond a reasonable doubt that he made any of the statements alleged, would naturally aid, defend and vindicate the cause of the Imperial German Government with which the United States was then and there at war, and would also naturally, necessarily and legitimately hinder and defeat [61] or prevent the success of the cause of the United States in said war; and third, that said statements, if any, were made by the defendant wilfully and knowingly with intent to support and favor the cause of the Imperial German Government in said war, and oppose the cause of the United States therein.

25. Error of the Court in refusing to give the jury the following instruction:

Under the charge of Count 4 of said indictment the Government must satisfy you beyond a reasonable doubt that the defendant criminally intended both to support and favor the cause of the Imperial German Government and to oppose the cause of the United States in the war, and that the statements made, if any, would naturally produce both said results; otherwise you should acquit the defendant.

26. Error of the Court in refusing to give the jury the following instruction:

E. C. Bendixen was produced by the Government as a witness to prove the charges set forth in Counts 1, 2, 3 and 4 of the indictment. You are instructed to disregard the testimony of said witness Bendixen for the reason that the testimony given by him does not tend to support the charges in said counts of the indictment.

27. Error of the Court in refusing to give the jury the following instruction:

The statute upon which the indictment in the case is based is an enactment adopted by Congress for the purpose of aiding the Government's war activities and preventing interference therewith. The statute is operative only when the United States is at war; its operation and application begin when war begins; and when war ends the statute ceases to be [62] operative. All of the provisions of the section of the statute upon which the indictments in the case are based have reference to war activities and war measures of the United States, or to the conduct intended to promote the success or cause of its enemies in the war, so that utterances concerning

the war which are not intended to and do not interfere with or affect in any way the war activities or war measures of the United States and do not promote the success or cause of its enemies, do not violate the statute.

28. Error of the Court in refusing to give the jury the following instruction:

"Promote," as used in the charge of Count 3 of the indictment, means to help, to give aid, or assistance to the enemies of the United States in the waging of the war.

29. Error of the Court in refusing to give the jury the following instruction:

"The cause of its enemies," as used in Count 3 of the indictment, means any and all of the military measures taken or carried on by such enemies for the purpose of winning the war as against the United States.

30. Error of the Court in refusing to give the jury the following instruction:

Counts 5, 6 and 7 of the indictment are based upon Section 3 of the Espionage Act as it existed prior to its amendment May 16, 1918. That section of the statute prior to its amendment contained three clauses for which a criminal punishment was provided.

31. Error of the Court in giving the jury the following instruction:

It is proper that I should instruct you as to what [63] is meant by resistance to the United States as used in this law and in this charge. The other words in the law and in the charge are plain and were used

and have been used, in my opinion, in the ordinary, every-day, common-sense meaning.

Resistance as a proposition of law means to oppose by direct, active and *quasi*-forcible means, the United States; that is, the laws of the United States and the measures taken under and in conformity with those laws to carry on and prosecute to a successful end the war in which the United States was then and is now engaged. Resistance means more than mere opposition or indifference to the United States or to its success in this war. It means more than inciting, provoking, or encouraging refusal of duty or obstructing or attempting to obstruct the United States. The element of direct, active opposition by *quasi*-forcible means is required to constitute the offense of resisting the United States under this provision of the law and under this charge of the indictment. The offense, however, may be committed by wilfully and intentionally uttering language intended to promote the cause of the enemies of the United States without necessarily inciting, provoking, or encouraging forcible resistance to the United States. To promote means to help, to give aid, assistance to the enemies of the United States in the waging of this war. The cause of the enemies of the United States means any and all of their military measures taken or carried on for the purpose of winning the war as against the United States. The cause of the United States as used in this act does not mean the reason which induced the Congress of the United States to declare a state of war between the United States and the Imperial Government of Germany. It [64] does

not mean the aims of the war in the sense of the terms of peace to be imposed or the results to be accomplished or the time and conditions under which it is to be brought to a termination. In plain language, it means the side of the United States in the present impending and pending struggle. The words "oppose" and "cause" should be weighed and considered by you as limited to opposing or opposition to such military measures as are taken by the United States under lawful authority for the purpose of prosecuting that war to a successful and victorious determination.

32. Error of the Court in overruling and denying the motion of defendant for an order in arrest of judgment upon the verdict of the jury finding the defendant guilty as charged in Count Three of the indictment.

33. Error of the Court in overruling and denying the motion of defendant for an order in arrest of judgment upon the verdict of the jury finding the defendant guilty as charged in Count Four of the indictment.

WHEREFORE defendant, plaintiff in error, prays that the above and foregoing assignment of errors be considered as his assignment of errors upon the writ of error; and further prays that the judgment heretofore rendered in this cause may be reversed and held for naught and that plaintiff in error, defendant above named, have such other and

further relief as may be in conformity to law and the practice of the Court.

(Signed) HENRY E. McGINN,
VEAZIE, McCOURT & VEAZIE,
Attorneys for Defendant and Plaintiff in Error.
[65]

State of Oregon,
County of Multnomah,—ss.

Due service of the within assignment of errors is hereby accepted in Multnomah County, Oregon, this 22d day of May, 1919, by receiving a copy thereof duly certified to as such by A. L. Veazie, one of defendant's attorneys.

(Signed) BARNETT H. GOLDSTEIN,
Asst. U. S. Atty.

Filed May 22, 1919. G. H. Marsh, Clerk. [66]

AND AFTERWARDS, to wit, on Wednesday, the 22d day of May, 1919, the same being the 70th judicial day of the regular March term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [67]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA
vs.
HENRY ALBERS,
Defendant.

Order Allowing Writ of Error.

Now, on this day, this cause coming on to be heard on the motion of the defendant Henry Albers for a writ of error, and it appearing to the Court that a petition for a writ of error, together with assignment of errors, have been duly filed; it is

ORDERED, That a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals, Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and the same is hereby fixed at $10,000.00, and that execution of sentence be stayed pending the prosecution of said writ of error.

(Signed) CHAS. E. WOLVERTON,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within order allowing writ of error is hereby accepted in Multnomah County, Oregon, this 22d day of May, 1919, by receiving a copy thereof duly certified to as such by A. L. Veazie, one of defendant's attorneys.

(Signed) BARNETT H. GOLDSTEIN,
Asst. U. S. Attorney.

Filed May 22, 1919. G. H. Marsh, Clerk. [68]

AND AFTERWARDS, to wit, on the 23d day of May, 1919, there was duly filed in said court a bond on writ of error, in words and figures as follows, to wit: [69]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Bond on Writ or Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Henry Albers, the above-named defendant, as principal, and William Albers and J. T. O'Neill, as sureties, are held and firmly bound unto the United States of America in the penal sum of $10,000, for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, executors and administrators, forever, firmly by these presents.

Sealed with our seals and dated this 23d day of May, 1919.

WHEREAS, at the March term, 1919, of the District Court of the United States for the District of Oregon, in a cause therein pending wherein the United States was plaintiff and the said Henry Albers was defendant, a judgment was rendered against the defendant Henry Albers on the 17th day of March, 1919, wherein and whereby the said defendant was sentenced to be imprisoned in the United States penitentiary at McNeil's Island for a period

of three years and to pay a fine of $10,000.00, and the said defendant has sued for and obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to review the said judgment and sentence in the aforesaid action and a citation directing the United States to be and appear in the said United States Circuit Court of Appeals [70] for the Ninth Circuit at San Francisco, thirty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the obligation is such, that, if the said Henry Albers shall appear, either in person or by attorney, in the said Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for a hearing of said cause in said court and prosecute his writ of error and abide by the orders made by said United States Circuit Court of Appeals and shall surrender himself in execution as said Court may direct, if the judgment and sentence against him shall be affirmed, then this obligation shall be void; otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 23d day of May, 1919.

(Signed) HENRY ALBERS. (Seal)
WM. ALBERS. (Seal)
J. T. O'NEILL. (Seal)

In presence of
(Signed) J. C. VEAZIE.
G. H. MARSH.

State of Oregon,
County of Multnomah,—ss.

We, William Albers and J. T. O'Neill, each being duly sworn, say that I am a resident and freeholder in the State of Oregon and that I am worth the sum of $25,000 over and above all my just debts and liabilities and exclusive of property exempt from execution.

(Signed) WM. ALBERS.
J. T. O'NEILL.

Subscribed and sworn to before me this 23d day of May, 1919.

[Seal] (Signed) G. H. MARSH,
Clerk United States District Court, District of Oregon. [71]

Approved this 23 day of May, 1919.
(Signed) CHAS. E. WOLVERTON,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within Bond on Writ of Error is hereby accepted in Multnomah County, Oregon, this 22d day of May, 1919, by receiving a copy thereof duly certified to as such by A. L. Veazie, one of defendant's attorneys.

(Signed) BARNETT H. GOLDSTEIN,
Asst. U. S. Atty.

Filed May 23, 1919. G. H. Marsh, Clerk. [72]

AND AFTERWARDS, to wit, on the 26th day of May, 1919, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [73]

In the District Court of the United States, for the District of Oregon.

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on for trial in the District Court of the United States for the District of Oregon on the 25th day of January, 1919, before the Hon Charles E. Wolverton, Judge, and a jury duly impaneled to try the cause, the Government appearing by Bert E. Haney, United States Attorney, and Barnett H. Goldstein, Assistant United States Attorney, for the District of Oregon, and the defendant appearing in person and by Henry E. McGinn, John McCourt and Ralph Citron, his counsel.

Whereupon the opening statements having been made by the counsel to the jury, the following proceedings were thereupon had:

Testimony of Judson A. Mead, for the Government.

JUDSON A. MEAD, was called as a witness on behalf of the Government, and being first duly sworn, testified:

That his home is in Los Angeles, California, where he has lived about seven years. Prior to that, except a short time in the northern part of Los Angeles County, he lived in Santa Barbara County from July, 1907. Prior to that he had been most of the time in Contra Costa County, California; six months or so in Santa Clara County, California. In 1901, May, he thought, he landed at Spokane, Washington, from the east. Was in Spokane and vicinity about four months. Went from there to Seattle, was in Seattle until he sailed [74] for San Francisco, about three days before December, when he arrived in San Francisco, in 1901. Prior to going to Spokane his home was in Wellsville, Allegheny County, New York, but he had been in the oil fields of McKean County, Pennsylvania, for several years before this. The previous September he had left Bradford and been in the Indiana oil fields until that spring, when he left for the west. He was born on what was known as the Mead Homestead in Trapton Brook, about two and one-half miles from Wellsville, Allegheny County, New York. Aged 45. Registered in the last draft, at Huntington Park, a suburb of Los Angeles, the night before September 12, 1918, as he was going out of town next morning. Went to the headquarters and filled out his questionnaire some time later. He is a man of family, a wife and two boys. He left Los Angeles

(Testimony of Judson A. Mead.)

Sunday night, October 6, on a trip of investigation of the prospective oil fields in Northern Canada. He was employed by others. At that particular time his business was the investigation of those oil fields. He went from Los Angeles to San Francisco, coming north. Crossed the bay about nine o'clock and went to be on a sleeping-train an hour or two before pulling out time. It leaves there about eleven o'clock at night, something like that. Thought the train was known as Oregon No. 54. It was the 7th of October that he took the train. At that time he was not acquainted with L. W. Kinney, or L. E. Gaumaunt. Met Gaumaunt on the train next day. Did not know Mr. Bendixen prior to that time and never saw him to know who he was until two days ago. Did not know F. B. Tichenor or Mr. Kinney prior to getting on the train, neither did he know Mr. Albers. First saw the defendant, Mr. Albers, along near noon. Noticed that there was a berth in the car that was not [75] made up until much later than the rest. Along near noon (October 8) the day after he got on the train. Don't remember of seeing him again that afternoon until in the evening. Might have seen him pass through the car, but made no note of it. Remembers next seeing him perhaps about eight o'clock in the evening of the 8th. They were somewheres this side of Ashland, on their way north. Saw Mr. Albers in the smoking compartment of the observation-car. The first time he saw Mr. Albers in the smoker there was no one in there except this Gaumaunt, L. E. Gaumaunt. It might have been a

(Testimony of Judson A. Mead.)

little after eight o'clock. He thought Mr. Gaumaunt and Mr. Albers were engaged in conversation. Knew they were, in fact. Heard them talking. Witness had been talking to Gaumaunt previously during the day. They had not talked about Mr. Albers. Had not heard his name mentioned. He was not sure but there was some remark made wondering why his (Albers') berth was not made up that morning until later. Outside of that nothing was said concerning Mr. Albers. Did not know who Mr. Albers was at the time. Didn't know anything about who was in the berth. Knew somebody's berth was not made up as late as about noon. May have discussed that with Gaumaunt. Was not sure he did. Witness and Gaumaunt had not discussed Mr. Albers in any other manner prior to the time witness went into the smoking compartment, about eight o'clock in the evening. When he went in there Mr. Gaumaunt and Mr. Albers were some little time—for some minutes, perhaps ten or fifteen minutes, didn't know exactly, the talk was all common place. He paid no particular attention, although he entered into some of the conversation, that is in common place remarks. He did not sit down in the smoking-compartment. He was standing there. [76] Mr. Albers was sitting down and this Gaumaunt was half sitting down and half standing up, leaning back against something.

Thereupon the witness was asked the following question:

Q. And from that point on, now, I wish you would just tell the jury what you saw or heard as between

(Testimony of Judson A. Mead.)

Mr. Gaumaunt and Mr. Albers at that conversation in the smoking-car; and if you joined in the conversation, state what you said, or what Mr. Albers said to you.

Defendant thereupon interposed the following objection to the question last set forth:

Mr. McCOURT.—If your Honor please, we want to interpose an objection to that question, for the reason that it is incompetent, irrelevant and immaterial. The indictment charges that the conversation on which these charges are based at this date occurred in the presence of Gaumaunt, Bendixen, Tichenor, Mead, Kinney and others. Now, if this is competent at all, it would be competent as to other statements; but before it would be competent, it would be necessary for the Government to prove the conversation, or offer to prove the conversation charged in the indictment as occurring in the presence of these people that are charged.

The Court thereupon overruled defendant's objection, to which ruling defendant saved an exception, which said exception was allowed by the Court.

Thereupon the witness continued his testimony as follows: He was merely listening for the next few minutes. Every few minutes Mr. Albers made some remarks and there was nobody else talking. He says: "Well, I am a German and don't deny it. They will never lick the Kaiser, not in a thousand years. Once a German, always a German." Witness was looking right at him. They had been carrying on for perhaps five or ten or twelve or fif-

(Testimony of Judson A. Mead.)

teen minutes a common, ordinary conversation, [77] as people will meeting in the smoker, and no particular interest to him. He didn't remember what was said. And something was said, some remark made, he thought by this Gaumaunt, something concerning the war, and that was the time that Mr. Albers made these remarks. He had been sitting there talking and visiting with them for a few minutes before this. After he made these remarks he swung his arms—throwed his arm back some way, made some gesture with his arm, and started some kind of a recitation which witness thought was in German. As witness remembered it, he was using the words "sprechen," "Rhine," and "offen," and as he understood that sprechen meant speech for German he thought it was in German what he said. Didn't know. Didn't understand it, however, whatever it was. Don't speak German himself. That was all he heard just then. He got up and walked out of there. This man Gaumaunt introduced him to this man Tichenor at this time, just outside the smoking-room. He didn't remember that he had seen Tichenor before that time on the train. Gaumaunt went outside at the same time he did. Went there and introduced him to this man (Tichenor). Then he, witness, made notes of these remarks that Albers had made in his presence. Soon after he went back into the smoker to see if he was going to make any more remarks of the same line. He made notes of what he had heard in there because Mr. Tichenor suggested that he might be called as a wit-

(Testimony of Judson A. Mead.)

ness for the Government on that account. Tichenor suggested that he make notes of what he saw or heard, and he did so. Didn't think there was anyone in the smoking compartment when he went back; wasn't sure. Soon after he went in someone else came in, but didn't remember who that was. He and Mr. Albers talked a very little after he went back into the smoking compartment. There was a few commonplace [78] remarks that he didn't remember, then Albers looked at him and says: "Do you play the oil game"—or he says, "Do you play the game?" Witness said, "I play the oil game pretty strong." Albers then asked witness the second time if he played the game. Witness replied, "Nothing much but the oil game." Albers says: "You don't know what I mean. You are a damn fool." Didn't think there was anybody present at that time, but wasn't certain. Albers' condition at all the time that they were talking to him was of a man that had been drinking but not to such an extent that it impaired his possession—thought he was in full possession of all his mental faculties at that time. Whether he was in possession of them physically or not he didn't know because he didn't see him walk. He was very emphatic in these statements. Didn't remember that Albers made any gestures so long as they were carrying on the ordinary conversation, but at the time that he made these remarks he was gesturing—thought with the left hand, but didn't know. Knew he was gesturing with one or the other of his hands or arms, or both. Didn't re-

(Testimony of Judson A. Mead.)

member exactly how the gestures were. Under the impression that he had his hand or arm—didn't know whether his fist was closed or his hand—it was his impression that he was doing something with this arm. Knew he was with one or the other of them, but didn't remember as to that. Didn't think there was anything about his actions that indicated he didn't have possession of his faculties. At the time witness went back in there before he made these last remarks there were several people—didn't know exactly how many, but should guess somewheres from one to six people, one after another came by the door and pulled the curtain out like that and took a sharp look at Mr. Albers like that, closed the curtain and went on again. And after that was [79] done Mr. Albers didn't say anything for several minutes, probably four or five minutes—didn't say a word. Don't know why. It was just after that—when he said "Do you play the game?" was the first thing he said after that, witness thought. Had never seen Tichenor until after he went out of the smoker after hearing these first statements, that is, never had seen him to know him. At the first conversation no one had suggested to him that he go in there for the purpose of listening or hearing, just happened in there and stopped to talk a minute. At the time Mr. Tichenor suggested that he make notes he says, "That is Henry Albers, of Portland, a big millman." That was after witness heard this first conversation. Didn't recall having seen Mr. Tichenor or Mr. Kinney prior to that time. Never saw either of them to

(Testimony of Judson A. Mead.)

know them until since he had been in Portland the last two weeks. Gaumaunt is the only one of the parties connected with this matter he had seen prior to the time he went in and found Albers and Gaumaunt talking the first time in the smoking-car.

On cross-examination the witness further testified: Yes, he supposed Mr. Gaumaunt was acquainted with Mr. Tichenor. When he came out there Gaumaunt introduced him, anyway. He inferred that Gaumaunt had had some conversation with Mr. Tichenor before he went in there. He understood Gaumaunt to say that he was in some kind of a public capacity previously in the day. Wasn't sure whether Gaumaunt displayed a star to him or not; didn't remember that he did that. Thought they talked there probably longer than ten or fifteen minutes before Mr. Albers said anything at all about the war and thought what he said was in response to something Mr. Gaumaunt [80] said about the war. Didn't remember what it was Gaumaunt said about the war, because it was just a commonplace remark that started this up. He didn't pay any attention until he heard these other remarks. Didn't remember that Gaumaunt said something about the Germans in order to get a rise out of Albers. Didn't remember what the remark was, so there would be no use trying to recall it. It was something that started the conversation; that is all he knew. Construed the remarks as of a pro-German character. He was under the impression that the recitation was something pro-German in character, but was not

(Testimony of Judson A. Mead.)

sure. Don't know for certain whether it affected the war or referred to the war or not, as he didn't understand the German language. Didn't know as to whether Gaumaunt pretended to understand the German language. Didn't remember whether Gaumaunt talked German to Albers at all, and didn't know whether Gaumaunt put down any statements or not. Only knew his own actions. Went out very soon after the statements were made and put them down in writing. Wasn't sure whether they went out and left Albers alone, because some of this time there had been another party in there. Didn't know who he was; it might have been this man Dixon. No one went out with him that he remembered anything about excepting Gaumaunt. Had carried the notes he made in his coat pocket in the front leaf of his note-book, torn loose, ever since. Had them now. Thought Tichenor copied them. Wasn't sure exactly how that happened, but thought Tichenor copied them right out of his book. The statement that he made first is put down second there. He put down the statement that he thought was most important first. Wrote them on the train. Claims that the statement, "I am a German and don't deny it," was the first statement defendant made. Some explanation (?) brought up [81] that remark. The statement, "Once a German, always a German," was the third statement that he made, as witness remembered it. The statement, "I am a German and don't deny it," is in between those two. Yes, sir, the second statement he made was, "They can't lick the

(Testimony of Judson A. Mead.)

Kaiser, not in a thousand years." Mr. Tichenor and Mr. Gaumaunt didn't stay right beside him while he was writing it, but they were close by there, some place. He sat down and wrote his own notes. Mr. Tichenor copied his notes, and he thought Mr. Tichenor had another remark put down there. That is all the notes he made. All he knew anything about, only as it was something unimportant.

The memorandum made by the witness was thereupon offered in evidence by the defendant in connection with the witness' testimony, received without objection and marked Defendant's Exhibit 1.

Thereupon the witness was asked the following question:

Q. Now, do you mean to tell this jury that a man who had ten minutes acquaintance with you, and called you a damn fool right off the reel, was not drunk? A. I don't mean—

Q. And pretty drunk?

A. I don't mean anything about that, Mr. McCourt. I didn't say at any time that he had not been drinking. I say that I said at the time that he made these remarks that I thought he was in possession of all his faculties. As a matter of fact, he had been drinking considerably between the time of these first remarks and these latter remarks.

The witness, continuing, testified: Well, he might have been there more than half—probably was there more than half an hour altogether, probably three-quarters—possibly [82] an hour altogether from first to last, but this conversation, when he called

(Testimony of Judson A. Mead.)

him a damn fool, was within a very few minutes after he had engaged in conversation with him. Yes, he expected twenty minutes, probably, twenty or thirty minutes at the end of the first conversation, perhaps. From the first to the last he supposed defendant had had probably four or five drinks. Didn't think Gaumaunt drank with him all the time, but was certain that he saw Gaumaunt drink at least twice. Took a drink with him once himself; once only. Defendant seemed to be generous with his booze. Seemed to be a hail-fellow-well-met in the beginning. The German recitation was given immediately after he made these first statements given by witness. Thought it was ten or fifteen minutes. He didn't stand up to recite; made some gestures during that. Witness thought he was very emphatic about the recitation. Did not remember that defendant asked if witness knew what he was saying or what it meant. Witness is within the registration age. Didn't think he had his registration card with him. Didn't know that he was supposed to have that since the armistice was signed. Thought if he ever lost it and needed it the worst could be the charges of a telegram down to see whether he had or not. Was born July, '73. Believe he claimed an exemption. Didn't remember that he received a classification card. Well, yes, he asked to be put in a class that a man who had a wife and other dependent children had a right to claim. They hadn't sent out the questionnaires for his age at this time, but the fact that his people wanted him to make a trip of inspection

(Testimony of Judson A. Mead.)

into the Canadian oil fields made it necessary for him to make out a questionnaire. He went down there and got this out hurriedly with the help of a storekeeper down there who had volunteered for this work. Yes, [83] his wife signed it. Thought she signed the exemption claim, whatever it was. Didn't hear defendant make any more remarks that he thought were seditious, except as he has told here. Never saw Tichenor in the smoking compartment, before or after. Didn't remember he was out with his ear up against the curtain. Knew that after this —after he had been out there and made notes, he saw Tichenor there in the hallway near the curtain to the smoker. He was out and in, and in the smoker two or three or four times after that. Saw the porter ask Albers to go to bed. Was in there once when the porter asked him to go to bed. Didn't see the porter take his grip. Saw the porter in there. At the time he heard the porter say this remembered of no one being in there but himself. Might have been, but didn't remember. No, that was after this conversation occurred. Thought at this time the porter came in there was shortly after he had made these remarks that witness heard. He wasn't in there much after that. He was in there and out, but at this time he happened to be in there and he thought alone with defendant when the porter came in and asked him to go to bed, and didn't see the porter take his grip out. Didn't know where Gaumaunt was then, nor Tichenor. Didn't know whether that was after he met Tichenor. He inferred

(Testimony of Judson A. Mead.)
they (Tichenor and Gaumaunt) were right there some place handy in the front end. Albers didn't show any inclination to go to bed or not to. He didn't pay any attention to them that he could see. No, he wasn't in a condition pretty far advanced in stupor at that time. He had been drinking so much that he was drunker than he had been earlier, but still he was in pretty good shape. Thought he was drunker than he had been before. Didn't see him go to bed that night. Didn't know a thing about whether he tumbled into his berth [84] and slept there with his clothes on all night. In speaking of the smoking-room he referred to a little room there, wash-room; yes. Thought about two or three basins in it. Thought one seat there that would probably seat two reasonably comfortably. Didn't remember whether there was one seat where one could sit. Thought if more than three men in there the rest had to stand up. Thought some of the time this other party that he didn't remember sat down beside defendant at one time. As he remembered, the fellow he didn't know was a man perhaps five foot eight inches tall, and weighed anywhere from 145 to 160 pounds, and was dressed, a suit that would not be black nor it would not be grey, something between. A very dark grey. Thought you would call him reasonably dark, not particularly dark, brunette, perhaps. He didn't see anyone making notes except Tichenor and possibly Gaumaunt. Not sure if Gaumaunt made notes or not, but knew Tichenor did. The only time he remembered seeing

(Testimony of Judson A. Mead.)

them making notes was about the time he was making his notes, and supposed that it referred to the same conversation. Didn't know what they made on their notes. Never volunteered or enlisted, or attempted to volunteer or enlist as a soldier, prior to the time he was within the draft.

On redirect examination the witness testified that he arrived in Portland the next morning, about seven-thirty. Didn't remember exactly. Was in Portland about thirty minutes, he thought, just had lunch and took the car on to Seattle. Went to Seattle. Had some business there that took him a day and a half. From there went to Vancouver, was in Vancouver searching for some data that he wanted and went from there to Calgary, to Edmonton; was in Edmonton he thought three days. Went from Edmonton to [85] Peace River Landing and from there down Peace River, a matter of about fifteen or sixteen miles. Back up that night to Peace River, in Peace River village and surrounding country for three days and then back on the Edmonton Railroad back to High Prairie. Communication of the Chief of Police at Edmonton brought him back to Portland. About the 30th or 31st of October. At that time he went before the grand jury. That is the reason and the manner in which he got back here. At the beginning didn't have any personal interest in the matter, but after he heard him make those remarks he had considerable interest just then. Felt like feeling his wool. Didn't report the matter to anybody but Mr. Tichenor.

(Testimony of Judson A. Mead.)

On recross-examination the witness testified: That before anything came up of this thing at all he took just one swallow with Mr. Albers. Only took one swallow the whole day. Saw Gaumaunt take two or three little drinks. He would not be sure, knew he saw him take as many as two. It was some time later the defendant called him a damn fool. That was one of the last things he heard him say. Thought he was drunker at this time, considerable drunker than he was before. Would have expressed the fore part of it as being mellow. Witness didn't make any verbal statement of the fact that he resented these statements. His face probably did, because he felt it quite strongly. Didn't know whether defendant was hardly clear enough to see that. Didn't ask whether he did or not, because if he said anything at all just then he would probably hit defendant. A little while later defendant called the witness a damn fool.

Testimony of Frank B. Tichenor, for the Government.

Thereupon FRANK B. TICHENOR was called as a witness in behalf of the Government, and being first duly sworn, [86] testified as follows:

At this time does and on October 8, 1918, did occupy the official position of Deputy United States Marshal. Lives in Portland. Has been Deputy United States Marshal for sixteen months, continuously. On October 8, 1918, he left Portland at one o'clock A. M. for Grants Pass, where he arrived

(Testimony of Frank B. Tichenor.)

around noon, something like that. Did not just remember. Had several subpoenas to serve in the case of United States versus Smull. Made services at Rogue River, Fruitdale or Fruitvale, and Grants Pass. He got to the depot in time to catch the train back that night. The train was a little late, as he understood, Caught the train at Grants Pass at 6:45 or 6:50. He had finished there, and was on his way to Roseburg. Had some warrants at Roseburg to serve. Had his dinner on the train. Didn't know who was on the train or who was going to be on the train. Had no business on the train except to get himself from Grants Pass to Roseburg. At that time knew Henry Albers only by reputation. He had heard the name, but had never met him. Didn't know he was on the train when he got on. He had not met L. M. Kinney, L. E. Gaumaunt nor E. C. Bendixen. Knew none of them, and didn't remember of meeting them previously. As soon as he got on the train he went immediately to the dining-car. From there he went to the observation-car. Had a ticket for a seat there in the observation. Went back there. Probably he was half an hour or three-quarters of an hour in the dining-car, didn't just remember. He went into the observation and there wasn't any seats; some were standing, so he left his grip there and went into the smoking compartment and on into the lavatory. Didn't notice who was in there at the time. When he came out was when he first met defendant, but didn't know who he was until some time [87] after that. Had never met him before. Defendant was seated

(Testimony of Frank B. Tichenor.)

in the smoking compartment. Wasn't doing anything at the time. Man was standing up. Afterwards found out it was Mr. Gaumaunt or Gaymant; didn't know how you pronounce it. Yes, had a conversation at that time with Mr. Albers. There was a bottle, a pint bottle, supposed to be liquor, setting near him, and he asked him where the cork was and to put it away. Didn't remember whether defendant answered him or not, but Mr. Gaumaunt took and set it down in the corner, Didn't know who Albers was at the time, and had never met any of the other witnesses. He went out of the smoking compartment, went out into the hall. Shortly Mr. Gaumaunt came out to him and wanted to know if he was an officer, and he told him he was, and Gaumaunt told him there was a bad pro-German—some words to that effect—in there and that there was a man who was going to clean him. Witness had better take care of him, and witness told Gaumaunt to go get this party and bring him to witness. They had a little conversation about it. Gaumaunt brought Mr. Mead. Witness told them they could not get anywhere by going in and beating the man up, and for them to go in and find out what he said and try to find out who he was and to remember anything that was said. He stood outside, as Mr. Gaumaunt told him that the party in there had recognized him. Yes, knew the witness, and, of course, going in there probably he could not find out anything. He heard defendant say at one time, that is when Mr. Mead was in there, "Once a German always a German." He was standing by the curtain on the outside. Later on, he didn't just

(Testimony of Frank B. Tichenor.)

remember who was in there at the time, but when some of the conversations were in there Mr. Mead wasn't in at that time when he said, "What right has this Government to tell me [88] what to do?" That is all witness heard. Some time afterwards, after he had been talked to by Mead and by Gaumaunt, a man by the name of McKinney informed witness that the man who was supposed to be making the objectionable statements was Mr. Henry Albers, of the flouring-mills. Witness left the train that night at Roseburg, about eleven o'clock. The next morning he phoned the United States Attorney's office and reported what was said and who the party was and all about it, and that he would be in that night. Phoned from Roseburg. When he last saw Mr. Albers he was seated in there. Witness saw defendant when witness was in the compartment and when witness looked in there two or three times. Kind of looked through the curtain, but didn't pay much more attention. He left it to these other parties, because he could not go in and he could not stand there very long in this hallway because people were passing in and out and he would have to step back and it was crowding the passageway. He was at the doorway very little. The only time that he was looking at defendant through the curtain was when he made the first remark, and defendant hit his knee and seemed to be somewhat bitter in saying that. The other time there was someone standing, and he didn't see defendant's face when he made the second remark. He didn't see the man drinking, but he

(Testimony of Frank B. Tichenor.)
would judge the man had been drinking. He wasn't lying down; he was sitting up and witness could not tell, just only he would judge the man had been drinking, but he cannot say whether there was anything to indicate that defendant did not have command of his faculties and was not in control of himself. He spoke very distinctly. There wasn't any mumbling.

On cross-examination the witness testified he would [89] not state exactly the time he got into the smoking compartment, because he didn't know how long he was in the dining-car. Should judge he got off at Roseburg about eleven o'clock or something like that. No, Albers wasn't in that wash-room when he got off the car. He understood he was—went to his berth, because the witness was in there afterwards before he went off the train. He didn't see defendant in his berth. Didn't know that defendant went to bed there with his boots on that night. When he first saw Albers in the wash-room there was one man there standing up. That was Gaumaunt, or Gaymant. Gaumaunt was not talking to Albers while witness was there. Didn't stand there very long. That compartment was just a small smoking-room at the end of the observation-car. Probably the wash-room. He knew it was a small room, much smaller than the average smoking compartment or wash-room on a car—Pullman. Probably six by seven. As he remembered it, there was just one seat. Didn't remember, but probably three or four. Didn't remember whether that many; didn't pay attention

(Testimony of Frank B. Tichenor.)

to the seats. Albers was occupying that seat. Had his grip in there. Didn't know whether it was liquor he had in the grip or not. There was a pint bottle, he supposed was liquor. Defendant did not ask witness to take a drink. Witness asked defendant to put it away. He didn't see the quart bottle. Didn't see them drinking in there when he was standing outside the curtain. Didn't hear them discussing drinks. Didn't notice anything of that kind; didn't see anything, because he only looked in there two or three times, just kind of peeked in through the curtain. Once in a while you could hear the conversation plainer than you could other times. They spoke English when he heard them. The only remarks he heard, as far as this case is concerned, [90] were, "Once a German always a German," and "Why should this Government tell me what to do?" Didn't know what it was caused Albers to say "Once a German always a German"; could not hear the conversation. Does not know what occasioned the remark. Don't know the drift of the conversation up to that time. Never heard pretty good citizens say during the war, "Why should this Government tell me what to do." Gaumaunt told him that he was a Special Deputy Sheriff, or something, in King County, Washington. Gaumount came right out and asked him if he was an officer and he told him who he was. Witness understood that Albers recognized him and mentioned something in the car about it, is why Gaumaunt came out, or probably by his action in telling defendant to put up, put away the liquor, or something. He didn't know why. Never had seen de-

(Testimony of Frank B. Tichenor.)
fendant before, and defendant had not seen him, as far as he knew. Didn't know what reason defendant would have for recognizing him. Didn't think defendant had his picture. Didn't think he ever saw his picture. Understood that Mr. Albers made some remark after witness left the smoking compartment about him. Didn't know what the remark was. Gaumaunt asked him if he was an officer. Witness then asked Gaumaunt to go find this man that he referred to that was going to clean up Mr. Albers, as he was very angry about the remarks. These things happened before he ever got into the car and he told Gaumaunt to bring him to witness. He brought Mr. Mead. Then he told Mr. Mead that he could not get anywhere by going in there and beating up a man, for him to go in there and find out who it was and try to find out what the man was saying and remember what he said, and had him put it down in his notebook, anything that was said, so he could remember. [91] Never heard that Mr. Albers had called Mr. Mead a damn fool. Mr. Mead and Mr. Gaumaunt went in there pursuant to that arrangement. Mr. McKinney was also brought to him. Didn't remember whether it was Mr. Gaumaunt who brought him or not, but someone brought him to him at the writing desk in the observation car. Mead and Gaumaunt had been in before that. Didn't know how long that was before he got connected up with Kinney. He knew Mr. Mead was in there when the first remark was made. When the last remark was made he was outside, he remembered, and someone else was in there. Didn't

(Testimony of Frank B. Tichenor.)

remember which one of them was in there at that time. It wasn't Gaumaunt that was in there. Gaumaunt did not stay there all the time. Yes, they brought him another man. Thought Mr. Gaumaunt brought him Mr. Bendixen. After quite a little persuasion, Mr. Bendixen said that his—before that, why, Mr. McKinney had told him that the party was Mr. Albers, then Mr. Bendixen was brought to him and he asked him to go in there and he said that he didn't like to go in. It placed him in a very embarrassing position, that he had an uncle who was a stockholder in the Albers Company, and witness told Bendixen that he was a pretty poor American citizen to refuse to go in there to find out anything that he could in this case, and then he consented and went in. Bendixen told him he was able to speak German. That wasn't exactly the reason for having him in there. He wanted more than two witnesses for the case. Well, he knew it was a very good proposition to get a number, and he knew that one witness would not do in a case like that; would rather have four or five witnesses. Up to this time all witness heard Mr. Albers say of a seditious character was "Once a German always a German," and the further remark [92] "Why should this Government tell me what to do?" The other men who had been in there had told him other things that had been said. Mr. Mead had told him what he heard and Mr. Kinney told him. Mr. Gaumaunt had told him things that he had heard. It wasn't what he heard why he was interested, it was what they told him that had been said. He didn't tell anyone to take any drinks

(Testimony of Frank B. Tichenor.)

or anything of that kind. Didn't know whether or not Bendixen would have to take a drink with Albers. He had no jurisdiction over Bendixen going in there and drinking, if he wanted to. Didn't remember of Bendixen saying he didn't want to go in there, because he would have to take a drink with defendant. He understood the conversation was carried on in German after Bendixen went in there. Didn't hear it. He was back there at the desk taking notes. Didn't see the porter trying to take Mr. Albers to bed before this conversation commenced or during it. Did not see the porter carry defendant's grip away. Didn't see Gaumaunt come and take it away from the porter and take it back.

Testimony of L. W. Kinney, for the Government.

Thereupon L. W. KINNEY was called as a witness in behalf of the Government, and being first duly sworn, testified as follows:

Has resided in Portland twelve years. Prior thereto lived in Boston. Merchandise broker. Going on four years. Previously was commercial traveler. For Allen and Lewis and Pacific Coast Syrup Company. Was with Rupert & Company, brokers, for a short time. On the night of October 7, 1918, was in San Francisco. Left on the night train about ten o'clock. Don't remember the number of the train. At that time knew of Henry Albers, but had never met him. Didn't know him by countenance. Did not see him on the train that night. Did not at that time or prior thereto know L. E. [93] Gaumaunt, J. A. Mead, E. C. Bendixen or Frank Tichenor. He

(Testimony of L. W. Kinney.)

didn't know any of these gentlemen were on the train or were going to be on the train. Absolutely none. Saw Mr. Albers on the 8th of October, 1918, shortly after they crossed the California line. Late in the afternoon. Shortly before they left Ashland. Mr. Albers was in the smoking compartment of the Pullman. It was a combination car. Prior to that time had not gotten acquainted with Mr. Mead or Mr. Bendixen or Gaumaunt. There was no one on the train that he knew. Went into the smoking compartment shortly before they left Ashland. Had his dinner after that on the train. Went into the smoking compartment to the lavatory. Knew none of these men before that time. Didn't stay in the smoking compartment. Saw Mr. Albers for the first time then. Nobody was with him. Had no conversation with him at that time. Didn't have any conversation with Mr. Albers until right after dinner. Was at dinner while they were going through Medford. Had seen Mr. Albers before he went to dinner. Didn't remember whether he went in there immediately after dinner, but it was soon after. Didn't remember whether there was anybody with Albers. Didn't have any conversation with him. Fifteen or twenty minutes later witness again went in. Saw Mr. Albers there. Gaumaunt was with him; no one else. Went in there and sat down and began talking with him. One of defendant's remarks was, "Once a German always a German." They were asking him about the war when he made that remark. Another remark he made was, "I served twenty-five years under the Kaiser." Witness said to him, "Do you mean to say

(Testimony of L. W. Kinney.)

you served twenty-five years under the Kaiser?" Defendant said, "Yes, I served twenty-five years under the Kaiser; then I came [94] to this country." He said, "All that I have got in this country, since I came to this country—what do I get in this country? I get shit, shit, shit." He pounded his left hand on his knee. The defendant said that if necessary he could take a gun and fight right here, and still used his left hand on his knee. He also said that we would have a revolution in between two and four years. At first he said two years and then witness checked him up on it, and he says, "No, not in two years, but within two to four years." He also said, "Why should this country tell me what to do?" He also said, "They can't get me." He said that he came to this country without anything and he would go away without anything, if necessary. Witness made notes that night on the train. He went in and came out several times during these conversations with Mr. Albers. Made some notes then, in between. Those notes were destroyed. They were unintelligible to anyone except himself. He made them in a hurry. Yes, heard Mr. Albers say, "They can never lick the Kaiser in a thousand years. I can take a gun and fight right here, if necessary—if I have to." Did not recall anything else. The things detailed did not all occur at one time. Conversation extended over approximately three-quarters of an hour. Thought Mr. Gaumaunt was there most of the time. There were others in and out, but didn't pay much attention to them. Don't know what part they heard. He engaged in con-

(Testimony of L. W. Kinney.)

versation with Mr. Albers himself in regard to this war. It was general conversation. He didn't know what was said by him with reference to any one of these statements that he claimed to have heard. Witness asked defendant how long he thought this war would last, and different things that he thought might interest defendant and himself. The [95] war was in its height at that time. Witness is 48 years of age. Aside from Mr. Gaumaunt, met Mr. Tichenor on the train during this conversation. Might have spoken with the others. Might have spoken to some one, but doubt it, besides Mr. Tichenor. Never remember seeing Mr. Bendixen until the first time up to the court building at the grand jury examination. Did not talk to Mr. Mead. Mr. Albers manner of uttering the language was comparatively clear. He had a cigar in his mouth a great deal, and there were some things that witness could not understand which he would like to know. They were in English. He most certainly should think defendant had possession of his faculties and seemed to know what he was saying and doing. Didn't know what stage a man had to be where you consider him intoxicated. Defendant answered the questions very quickly. Heard others talking with him. Mr. Gaumaunt was talking with him. Apparently defendant did not have any trouble understanding what Mr. Gaumaunt said. Would consider defendant had no trouble in understanding what witness said. He came on through to Portland next morning. Did not talk to defendant about other matters besides the war, not that he remembered of.

(Testimony of L. W. Kinney.)
Talked with Mr. Tichenor on the train about reporting what he had heard. Tichenor didn't direct him to report it here. Came to the United States Attorney's office by subpoena.

On cross-examination this witness testified: He understood that there was someone using propaganda talk and he was a United States citizen and felt that it was his business to hear what he could. Has never been a drinking man himself. Had taken a drink but had never been intoxicated. Never been drunk in his lifetime. Has [96] taken a drink the same as a man would drink and go about his business. Has never been as far as the cup that inebriates. Has had some occasion to take care of a few people sometimes when they were a little intoxicated. Never was intoxicated. Has never been so far that he forgot what he said or was astonished at things that were told him next day that he believed he could not possibly have spoken. Absolutely not. Considered that defendant knew what he was doing. Has seen people that could sit up that were very much intoxicated. Has heard of people being so drunk that next day they didn't know what they said, but knew nothing about it himself. A man that will give you a quick answer he would consider knew what he was doing. He was willing to get any propagandist in these United States. He would not consider that you would have to tell an America citizen that he saw there in the mire that he was in danger and to keep his mouth shut. Would hardly think that it would be becoming to tell a United States citizen to be care-

(Testimony of L. W. Kinney.)

ful of his conversation. If his feelings were such that he could be caught in the trap he thought that he should be caught in the trap. He wasn't there to entrap him. When he traveled for Allen and Lewis seven or eight years ago he carried Albers Brothers line of goods and carried it in his house, too. Always encouraged trade with those people. Witness was the moving spirit of this occasion in this entrapping business. Thought it was his own suggestion to get in and be a part of the game. He didn't speak to Mr. Tichenor until afterwards. Gaumaunt was there. Knows Gaumaunt wasn't the moving spirit in all that was done. Witness thought perhaps he was the starter of the whole thing. He overheard someone speak, could not tell [97] who right now, that there was a propagandist in the smoking compartment. He didn't know Mr. Albers, didn't know his name until Albers told him. Albers could be a propagandist and have a leading business too. He would not say that any reasonable man was so foolish as to jeopardise and risk his whole business for a few words that were spoken on a train at that time. Defendant might have been an unreasonable man in making such remarks as that. He should consider him unreasonable. He should consider any man unreasonable that would make such remarks. Albers was speaking for his country. He told witness that he had served under the Kaiser for twenty-five years. He would not consider such a man crazy, he would think he was a propagandist. He didn't come out in the car and talk openly; he talked back there in the

(Testimony of L. W. Kinney.)

corner in the smoking compartment. Witness went in there and engaged in conversation with him. Asked him about the finish of the war and what he thought. What the Kaiser could do and what he was going to do, etc. No, sir, he didn't note down what he said to defendant. Yes, sir, noted down very carefully what defendant said to him, because he had a right to, because witness was protecting the United States Government. Witness was a United States citizen and was looking for what he might say in regard to disadvantage to the United States Government. Any propagandist is unreasonable. By propagandist he meant a party who is doing work against the Government in this country. After hearing those utterances he thought defendant was doing work against the Government, yes, sir. Did not know, hardly, as a matter of fact, that that man in the presence of five full-blooded, red-blooded Americans, that would talk that way, they would tear him limb from limb, if there had been any reason for it. No, sir, he didn't [98] believe that. Witness certainly did act deliberately, with very great deliberation. It all came to him that quick. Defendant is much older than he. Why should he caution him? He might have gone in there three times, perhaps. No one sent him in there. We went back the second time because he didn't know the first time he went in there that defendant was talking propagandist talk. He overheard a conversation between two other parties that there was a gentleman in the smoking compartment that was talking propagandist. Don't

(Testimony of L. W. Kinney.)

know who the other parties were. It might have been Mr. Tichenor or it might have been Mr. Gaumaunt, but he didn't know them. Or it might have been someone else. He could not tell who it was without speaking an untruth, and he could not do it. He positively could not tell whether it was Gaumaunt or Tichenor he heard talking. He would not say that it was not nor he would not say that it was, because he could not do it without perhaps saying something that he was not positive of. He had been in twice before and defendant had said nothing to him. Most any time he would engage a man in conversation in that manner for the United States Government. He wasn't in the habit of associating with people under the influence of liquor unless he really had business. Before that he gave defendant no chance to say anything to him. Defendant did not say anything to him. After he had overheard this conversation he went down there and engaged defendant in talk, yes, sir. And it was after he engaged defendant in talk that defendant said these things. Tichenor absolutely did not tell him to go there, nor did Gaumaunt. Why should he know who was the moving spirit, Mr. Tichenor or Mr. Gaumaunt. That was beyond him. Didn't know [99] whether Mr. Tichenor or Mr. Gaumaunt were the moving spirits there in that talk that night. He might have been the moving spirit. He wasn't sure as to that. What he did there was entirely upon his own motion. And he told someone, he didn't know who it was, that if there was a propagandist they

(Testimony of L. W. Kinney.)

would get what he had to say and he went back with the idea of getting it. Did not know whether the someone to whom he said that came back with him. Mr. Gaumaunt he thought was in there when he went in. He could not express to whom he addressed that remark and be positive. It might have been Gaumaunt. He would have to talk at random, he could not give an answer to that. It might have been any one of the four or five witnesses; he really could not tell which one it was. At that time he had not separated them to such an extent that he could tell now. Well, he could not guess it. He really could not answer that, because it would be at random and it would not be worth the paper it was written on. After it started he and Mr. Gaumaunt and Mr. Tichenor and Mr. Bendixen were getting together there that night in concert on this propagandist. Didn't know what he called the starter. Didn't know the starting point. They might have been working on the case before he was there; he didn't know. He spent that three-quarters of an hour to an hour and got what evidence he thought he needed, and went to bed, because he was sick all that day. So far as he was concerned the starting point was when he went in there himself; when he went in there to find out what he could hear. He had heard some people say that there was a propagandist in there and immediately went in, yes, sir. He overheard a conversation which wasn't addressed to him and could not tell between whom that [100] conversation was. But after he heard it that became the starting point with him. He

(Testimony of L. W. Kinney.)

went into the car and had this conversation with defendant. After that he went out several times and put his notes down and went back again. He put his notes down on his own motion, right away. Since he became acquainted with Mr. Tichenor, the gentleman that he talked with when he came out was Mr. Tichenor, after he came out of this room. Someone told him that he was an official of the Government, and he talked it over with him. Really could not tell whether it was Gaumaunt told him Tichenor was an official; thought possibly it was Mr. Gaumaunt. Tichenor told him to get more evidence. Then he went back again. "You bet I did." And Tichenor remained on the outside. If he had any talk with Mr. Tichenor before *me* met him after coming out of there he didn't know him at the time. Didn't remember whether Gaumaunt introduced him to Tichenor. He was sure he didn't know who it was, that his memory didn't serve him upon anything that related to the movements that led up to his conversations with Mr. Albers. Possibly he jotted down his notes in Mr. Tichenor's presence, and possibly not. He took some of them in his presence and some of them he took by himself. Could not tell the occasion for dividing up part in his presence and part away from him. Didn't know whether Mr. Tichenor overheard the conversation had at that time. Presumed he did. Mr. Tichenor might have been at the curtain. He presumed likely he was. Well, he was pretty sure that Tichenor was. No, sir, he didn't agree before he went in there that Tichenor was to be at the curtain.

(Testimony of L. W. Kinney.)

Didn't know Tichenor's name even then. Gaumaunt told him that Tichenor was a deputy marshal. He [101] might have gone back on Tichenor's say-so, still at the same time he would have gone back on his own. Tichenor might have told him to go back. He did tell him to go back for more evidence; at the same time witness was there to get what evidence he could himself. When Tichenor told him to go back he went back, absolutely. He should have gone back anyhow, yes, sir. After he came out the second time he jotted down a little more and went back again. And got some more in the third drive. Thought he jotted that down, if he remembered correctly. Didn't remember whether in the presence of Tichenor or away from Tichenor. Didn't think Tichenor told him to go back the second time. Can't remember that Tichenor told him to go back the third time. Didn't know why he should have known that if defendant had been in his right mind his going back three times would have put him on his guard, supposing that he had been the most arrant knave in the world or propagandist, as he termed it. Didn't know why his repeated visits to defendant at that time would have told defendant there was something on there. No, he did not know that it was a fact that defendant was so drunk and the witness knew he was so drunk, that defendant could not recognize him between the first and the second and the third visits.

Testimony of L. E. Gaumaunt, for the Government.

Thereupon L. E. GAUMAUNT was called as a witness in behalf of the Government, and, being first duly sworn, testified as follows:

He lives at Kent, Washington; thirty years of age, past. Registered for the first draft at Local Board in Greenwood District, State of Washington. Didn't know just the number of the Board. Filled out a questionnaire. Received classification in Class 4–A. He is in the automobile [102] business at Kent, Washington. Has been engaged in that business about seven years. Does not hold any official position in the State of Washington outside of a Special Deputy Sheriff for King County. On October 8 he was on a train from Berkeley. Got on the train from Berkeley, California, coming to Portland. Got on the train at eleven something at night on October 7. Bound for Seattle and Kent, his home. At the time he boarded the train he did not know E. C. Bendixen, L. W. Kinney, J. A. Mead or Frank Tichenor. Didn't know the defendant, Henry Albers. Had not met any of these people prior to that time. On the morning of October 8, something like twelve o'clock, defendant got out of bed. His berth was down until twelve o'clock. That is just how witness happened to notice him. Didn't know who he was at the time. That was the day after witness boarded the train. His attention was not directed again to the defendant until witness went into the smoker that night, about a quarter of eight. No one sent him to the smoker, only the observation was

(Testimony of L. E. Gaumaunt.)

full and there wasn't any room in there to smoke. Prior to that time of going into the smoker, right about eight o'clock, he had not had any conversation concerning the defendant Albers with anyone. When he first went in he noticed Mr. Albers and a man whom he later learned was Mr. Bendixen. Didn't know it was Albers or Bendixen at the time. No, sir, he did not hear that conversation between the two of them. In fact, he didn't pay much attention to it. He didn't stay in the smoker then. He came in and took a smoke and went into the toilet and then came back out. Heard nothing particular that he can remember now. Went back the second time pretty close to eight o'clock to [103] smoke. Had not talked to Mr. Bendixen or anyone else concerning the defendant. When he went there the second time, about eight o'clock, he believed Mr. Kinney was present. Didn't know him at the time. Later found out that was his name. He had been talking to Mr. Kinney during the day about business trips, but nothing else. Mr. Kinney was in there, he would not say he was sitting with Mr. Albers, though. He heard Mr. Albers make that remark about McAdoo, McAdoo being a son-of-a-bitch. Defendant did not seem to be addressing anybody in particular. That was the only remark he heard him make. Defendant had been drinking. He believed there was a bottle there on the seat. Albers was sitting down. Defendant's speech about McAdoo was plain; yes, sir. He heard it plainly. After that remark was made he didn't participate in any conversation outside of asking Mr.

(Testimony of L. E. Gaumaunt.)

Kinney who the man was, and didn't he think defendant better be put to bed. This was right after he made this remark. Witness said this right in the room in the presence of Mr. Albers. Nothing else took place, only Mr. Kinney said he thought—he didn't believe in putting a propagandist to bed, or something to that effect, and witness asked Mr. Kinney if he knew who the man was and he said he didn't. After that a gentleman by the name of Mr. Mead, he believed, that heard part of the conversation, that came in there was going to whip defendant, or something to that effect, and then Mr. Tichenor came inside to go to the toilet. He didn't know who Mr. Tichenor was at the time, but later found out it was Mr. Tichenor. Mr. Tichenor came in to go to the toilet and when he came out he saw this bottle there and he said to Mr. Albers—he said, "Put the cork in that bottle and put it away." Mr. Albers [104] mumbled something—he didn't get what it was. Nevertheless he didn't put the bottle away and to avoid further trouble witness took the bottle down and put it away—put the bottle out of sight, and Mr. Mead was getting pretty hot under the collar and witness judged by that that Mr. Tichenor was an officer, telling him to put the bottle away, and he followed out and asked him if he was an officer and he said he was a Deputy United States Marshal, so witness told Mr. Tichenor what was going on in there. Witness said, "That old gentleman is going to be hurt." "I think if you are an officer you had better take care of him," and Tichenor said, "Well, there

(Testimony of L. E. Gaumaunt.)

is a better way of doing it," or something to that effect, and he, Tichenor, asked them to make notes of whatever was said, which they did. Witness returned to the smoking-car then. Right at that time he thought there were two people in there when he returned. Defendant was talking about him being a German—"Once a German always a German." He also said, "I am a German and I don't deny it, and I am pro-Hun and my brothers are pro-Hun." Well, he says he came to this country twenty-five years ago—twenty or twenty-five years ago and thought that conditions in Germany were better than what they were in this country. He thought that this country wasn't as free as Germany. Witness didn't think defendant said anything about the Kaiser. He said something about him not serving in the German army. Defendant said that the United States could never lick Germany in a thousand years. Witness didn't write any notes of what he heard, no, sir. He brought them out and told Mr. Tichenor. Mr. Tichenor made the notes. Defendant said there would be a revolution in this country in ten years, maybe in two years and maybe to-morrow. He said that a Yankee [105] could never beat a German—the Yankees could never beat the Germans in a thousand years, or something to that effect. Witness continued his journey to Portland and next morning he went looking for the District Attorney, which Mr. Tichenor told him to do and turn in a report that he had. Mr. Tichenor told him to report to the District Attorney, which he did. He

(Testimony of L. E. Gaumaunt.)

went to the wrong building first. Found the building afterwards here. Saw the District Attorney. He should say he went and out of the smoking-room during the time that he heard these statements he has related five or six times. Seven times. Each time he came out and told Mr. Tichenor, so he could make notes of what was said. One time Mr. Tichenor was outside the curtain in the hall. The other times he was outside by the desk in the observation-car. Yes, sir, Mr. Albers expressed himself vigorously. He pounded his knee. (Illustrating with his hands.) Witness didn't believe they asked him any questions outside the witness asked him to go to bed and the defendant told him to go to hell. That was about the only question he asked defendant that he could recall.

On cross-examination the witness testified as follows: That his name was Leon; that he was born in New York. That he wasn't born in France. He might have said he was born in France. Might have told Judge McGinn, counsel for defendant, that he was born in France. His father was born in Marseilles. Didn't tell Judge McGinn he was born in Marseilles. Got on the train at Berkeley on the night of the 7th of October. Didn't see Mr. Albers until the next day. Didn't see or hear anything of Mr. Albers until the next day, the next evening. Saw him when he got up in the [106] neighborhood of twelve o'clock. Believe there was some comment made about his getting up at that time. Somebody said that they supposed he got on the train

(Testimony of L. E. Gaumaunt.)

drunk and never got up, something to that effect. He didn't know who it was. Saw him again that evening about a quarter to eight the first time. He was engaged in conversation with Mr. Bendixen. Didn't pay any attention whether they were talking English or German. Witness does not speak German. Speaks French quite a bit. To his children, yes, sir. His wife teaches the children French and is helping witness a whole lot with his French. His wife is a French woman. She comes from Bordeaux. Was born in Belloc, Puro Pyrenees, but was brought up in Bordeaux. He didn't hear anything of the conversation between Mr. Bendixen and Mr. Albers at a quarter to eight o'clock. Went back the second time to smoke. Didn't believe defendant was talking to anybody that he could recollect when witness went there the next time. Had not drunk with him at that time. Later on in the evening took two drinks with defendant. At eight o'clock when he was in there nobody was talking to defendant. Witness did not engage in conversation with him. Mr. Tichenor came in about 8:05 or something like that. Didn't believe anybody was talking with defendant at that time. Witness was in sight of defendant. Defendant had his booze in sight when witness was talking with him. Mr. Tichenor went to the toilet and came out and lighted up a cigar, as near as he can remember, and Mr. Albers was mumbling something to himself. He didn't believe anybody knew what it was at that time, and Mr. Tichenor told him he would better put the bottle away, which he didn't do. The

(Testimony of L. E. Gaumaunt.)

witness thought to avoid further trouble he would put it away. Defendant did not make [107] any remark when Mr. Tichenor told him to put it away; not right there. He did when Mr. Tichenor went out. He said he knew that big son-of-a—meaning bitch, was going to get him or something to that effect. Witness sat there for a second and Mr. Kinney, he believed, was in there with him and Mr. Mead, and Mr. Albers made the remark about McAdoo, and Mr. Mead started to get hot under the collar and witness said to Mr. Kinney, "Mr. Kinney, we better get that old gentleman to bed." Witness figured he might be some labor man or someone else. Didn't know who he was. If they could avoid trouble by throwing him into bed, wanted to get him into bed and out of harm's way. Defendant wasn't sober; he had been drinking. He seemed to know what he was saying. He sat up straight. Witness had drunk lots but tried to keep people from knowing it. At that time he thought defendant was so that he knew what he was doing. Witness asked him—he believed he asked him himself to go to bed, and defendant told him to go to hell; or something to that effect. Witness showed defendant his star; didn't show everybody on the train his star. Told Mr. Tichenor what Mr. Albers had said about McAdoo being a son-of-a-b—. Tichenor didn't say he knew who defendant was. Didn't tell Judge McGinn that he went down and said to Tichenor, "Do you know who that man is?" and Tichenor said, "Yes, I know who it is; it is Albers, and we have been watching him for two

(Testimony of L. E. Gaumaunt.)

years." There is only one thing he heard them say, defendant had been under surveillance for a year and a half. He believed that was Kinney. Remembered talking to Judge McGinn about this case. Came to Judge McGinn's office in the Oregonian Building. Didn't recall the day. Believed it was the day before or [108] two days before the grand jury was in session. Must have been October 30th. Nobody ever sent for him. Judge McGinn had not seen him before. A suggestion from Mr. George Albers caused him to come to Judge McGinn's office. He had been to see Mr. George Albers over in Seattle, after it was published in the paper. Didn't recall what day it was when he went to see Mr. George Albers? He noticed a piece in the paper about Mr. Joshua Green. They could hardly believe that any such things were said. Went to see Mr. George Albers just to convince him it was said. There was a piece in the paper there where he didn't believe and he didn't see how such a thing could happen. No, sir, it is not a fact he went there to get money from Mr. George Albers. No, sir, it is not a fact he came to see Judge McGinn to get money, only his own (Judge McGinn's) suggestion. Yes, he wrote the letter shown him by counsel. Tried to give it to the lady next door but she would not accept it, and said to put it under the door or put it in the mail box. Left it at Mr. Albers' house. That envelope was addressed by witness; that is his handwriting. The letter is in his handwriting. He tried to leave

(Testimony of L. E. Gaumaunt.)

it next door to Mr. George Albers' house in Seattle, and the lady would not accept it.

Thereupon the letter was offered and received in evidence and marked Defendant's Exhibit 2, and read as follows:

"November 12, 1918.

Mr. G. Albers:

This is something I don't like to do but I can't help it; ever since I got mixed up in your brother's case why I am losing most of my friends down here; I have been upholding him in all respects whenever I was asked about him; my wife also [109] is against me and says if he is saved why she will leave me; now if she wants to she is welcome to go tomorrow and the rest can go somewhere else. What I want to ask you is this, will your brother look after me after the matter is finished. I have a good job here and am making big money, if he is saved why I lose everything, which I cannot afford as I have nothing now only property which belongs to my wife, I am willing to sacrifice it all to save him if he will take care of me after it is all finished, which would be fine on his part. You asked me about when the case is coming up. I didn't think I should tell you but I see your interest is in the business. Mr. Heeny District Attorney, told me it would be either the 24th of this month or ten days later. Our chances are very good, I think. I told Mr. Heeny lots in my letter which the jury did not ask me, and I think he has another viewpoint of the case. I am going to stay

(Testimony of L. E. Gaumaunt.)

with him if they put me in jail, would like to see you but figure it better not to.

Kindly burn this up as it means a lot to me at this time. Kindly let me know your view of this matter. Mr. McGinn told me everything would be O. K. when I told him I would have to leave Kent, so I thought I would ask you. I am a special deputy here, otherwise I would have been licked, I guess.

Hoping everything will be O. K. I remain,

L. E. GAUMAUNT.

Excuse pencil as I am in a hurry and going to Seattle on business and thought it would be a good chance to bring this to your house myself."

Mr. George Albers had told him that he wanted to pay him for his trouble. He wasn't to any trouble, absolutely [110] none. He wanted to get paid to see if George Albers was as bad as his brother was. Yes, sir, he was trying to entrap him, absolutely. He hadn't entrapped his brother, no, sir. No, sir, he wasn't trying to entrap Judge McGinn, too. He came to Judge McGinn's office. Judge McGinn didn't ask him to come there. Told him to make himself at home there. Judge McGinn told him it would be well for him not to see him nor for Judge McGinn to see witness. After they were all finished, yes, sir. Remembered talking to the girl in Judge McGinn's office. Told her the story in regard to what happened on the train. Yes, sir, told it to everybody. Didn't remember saying to Judge McGinn, "Ever since this thing has started I haven't been able to sleep. Albers had been jobbed," or

(Testimony of L. E. Gaumaunt.)

words to that effect, no, sir. Never said Mr. Albers has been jobbed, no, sir. He said something in Judge McGinn's office to Miss Paula Tegen on the 30th of October, 1918, to the effect that he had not been able to sleep since this case started. He said he got into the mixup. He was kind of nervous on it, yes, sir. It is his first time to ever be in Court and get into a mixup. Didn't tell Judge McGinn it was because Henry Albers was being jobbed. Didn't tell him that defendant was so drunk that he didn't know what he was talking about. No, sir, he didn't tell Judge McGinn that the words were put into the man's mouth when he and Judge McGinn were talking together, nor that it was a shame to take a man of that kind and make a crime of that kind against him. No, sir, he said the man was drunk; he didn't say it was a shame. No, sir, he never said it was a shame and an outrage. He might have said something to the effect that he hadn't been able to sleep. He got kind of upset about it, because everybody there in the country [111] was asking him about it. It kind of worried him a little, anyhow. He didn't know how much time he was going to lose, just had to get his wife out of the hospital, had to come down here on indictment. Wasn't figuring to make a little out of it, no, sir. The letter saying, "Take care of you," means just what Mr. Albers said. He wanted to pay witness for his trouble, Mr. George Albers, when he went to him and told him just what his brother had said. He never pestered George Albers and followed him up. He called witness out and told him to go in

(Testimony of L. E. Gaumaunt.)

there and that he wanted to know the conditions, and right in front of his own attorney witness told him just how it happened on the train. No, sir, he never followed Judge McGinn, because all the conversation was in Judge McGinn's office, closed up. Did not say to Judge McGinn at that time, "Suppose that I was a stool-pigeon for Tichenor," no, sir. Didn't say, "Suppose that his job was put up on him and I can establish that there isn't anybody there that knows anything about it and if you have got me away there isn't anything left of this case," or words to that effect, no, sir. Never said "after you get me out of the way," at all. He came back to Judge McGinn's office in the afternoon. Didn't make any offer. Judge McGinn made him no offer outside of saying Mr. Albers is a man that has got lots of money. He and Judge McGinn didn't talk terms, no, sir. He had reference to his leaving Kent when he said in that letter that Judge McGinn said it would be O. K. Yes, sir, Judge McGinn said he would be taken care, Mr. Albers was a man that had lots of money. He assented to that in a way. Judge McGinn didn't state right then what he was to do, no, sir. He didn't recall what Mr. Albers was to take care of him for. [112] He didn't recall that he represented to Mr. Albers and to Judge McGinn that all there was to this case was what he knew of Henry Albers and that if he dropped out there would be nothing left of it, or words to that effect, no, sir. He told everything that happened in front of Mr. Albers' attorney. He told witness, "You tell the truth," and he says, "That

(Testimony of L. E. Gaumaunt.)

man is going to be guilty," and he says, "Stand by that and mention my name, if you want to." Not George Albers himself, this was his attorney. He didn't say it in Mr. Albers' office. He went there to see Mr. George Albers. He invited witness in. Nobody told him to go there. He went there the first time on his own motion, yes, sir. Mr. Albers' attorney in Seattle was at Mr. Albers' office. Witness talked with him. It was after the whole thing was published in the paper. No, sir, it wasn't the 9th or 10th; went on for a couple of weeks, he believed. Didn't recall how long it was before he came to Judge McGinn's office that he went to see Mr. George Albers. Knew of the porter on that train. No, he never said a thing to the porter.

On redirect examination the witness testified that as to the matters that occurred on the train on the day or evening of the 8th of October, 1918, he had testified here to the truth, absolutely, yes, sir. He testified before the grand jury to the same state of facts and in the form of an affidavit made in the District Attorney's office. He believed Mr. Haney conducted the proceedings before the grand jury when he was a witness. Yes, sir, remembered having a talk with the District Attorney after he came out of the grand jury room, at his office, before he went home that evening. District Attorney told him to keep his mouth shut. That was the only [113] thing he had told him to do. He had not told the District Attorney or anybody connected with his office about this communication of George Albers or his Seattle at-

(Testimony of L. E. Gaumaunt.)

torney—communication by witness, prior to coming down here for the trial a week ago Thursday. The matter of calling upon George Albers, that happened in Seattle. He later saw Judge McGinn here, and saw George Albers and his attorney in Seattle. Outside of Mr. Jones he had not seen fit to advise the Government or its representatives about that, until he came down here the day of the trial. He referred to a letter that he wrote to Mr. Haney, in his letter to George Albers, wherein he stated "Mr. Heeny, the District Attorney, told me it would be either the 24th of this month or ten days later. Our chances are very good, I think. I told Mr. Heeny lots in my letter which the jury did not ask me, and I think he has another viewpoint of the case." He never wrote the District Attorney but one letter. The one here shown him by the District Attorney. The District Attorney wrote him a reply, copy of which is here shown the witness.

Thereupon the letters just shown the witness were offered and received in evidence, marked Government's Exhibits "A" and "B" and read as follows:

"Kent, Wash., Nov. 6, 1918.

My dear Mr. Heeney:

I have been very much worried since I came back from Portland in regards to the Albers case. I answered the questions asked me correctly, but there was other things happened which I was not asked, and I been afraid that his attorney might ask of these happenings, and I am not posted as to what I should do. You said you wanted Mr. Albers to have a fair

(Testimony of L. E. Gaumaunt.)

trial and also the Government, and that has also [114] worried me. I will now tell you of some of things that happened. Not that I want to try and save him, but save myself from any further troubles. After I heard him make the remarks about McAdoo I told him that he better keep his mouth shut and I told him I was an officer from the State of Washington, and he would get himself in trouble. Now, Mr. Heeney, don't you think he must have been pretty drunk, otherwise he would have shut his mouth? The jury asked me how drunk he was, and I think it was my place to have told them then, but Mr. Tichnor told me to answer only what I was asked. Now I am asking you to advise me. Mr. Bendixen was talking to him in the early part of the evening, and never made any remarks to anyone in regards to Albers, although he knows Tichnor, I believe. So I went in the washroom and sat down and then the party began; it was late in the eve when I went to look for the fellow who was *who was* with him who later proved to be Bendixen. I don't know whether there is any personal feelings between Bendixen or Albers, only Bendixen said he had an uncle in the firm. I also heard some people say when I was at the hotel that Tichnor said if Albers was not found guilty he would throw his star in the lake and jump in after him, but I did not let them people know who I was. These are the things I think you should know, no*w* that I care for Albers in the least, and if he found guilty it is due to *you* good judgment, and I think *your* the man to know it all. If these things

(Testimony of L. E. Gaumaunt.)

I said will in any way interfere with what I said, why let me know, as I don't want to make a mess out of this. You said to tell the truth, which I am doing. But the jury did not ask [115] me about this, so I said nothing, but since that time I have worried about these things and now I feel some better. If at any time you should want to let me know about this, why this is my address. If you don't remember me by name, you will remember me by the white sweater, as you called it.

L. E. Gaumaunt,
c/o Ford Agency, Kent, Wash.

Kindly advise me as to what I should do in regards to this matter.

November 26, 1918.

Mr. L. E. Gamaunt,
c/o Ford Agency, Kent, Wash.

Sir:

Attendance upon the Court in trial has prevented an earlier reply to your letter of the 6th inst. which is hereby acknowledged.

I note what you say, and in reply have only to say that the Government expects you to tell the truth, the whole truth when you are called as a witness; neither less nor more than that will satisfy the Government or be fair to the defendant.

I cannot advise you as to when this case will be tried, but imagine it will be shortly after January first.

Respectfully,
UNITED STATES ATTORNEY.

Testimony of E. C. Bendixen, for the Government.

Thereupon E. C. BENDIXEN was called as a witness in behalf of the Government, and, being first duly sworn, testified as follows:

He is thirty-one years old. Has lived in Portland about two and one-half years. Prior to coming to Portland lived in Tacoma, Washington, about six or seven years. Prior to living at Tacoma lived at Springfield, Minnesota. He was born there. He is known as auditor and [116] inspector of the Aetna Life Insurance Company, Casualty Department. Has been engaged in that business two and one-half years. At Tacoma he was load dispatcher for the Puget Sound Light, Construction and Power Company. Prior to that he followed surveying, and also collecting for the Telephone Company. He is a married man; has two children. Was registered in the first draft. Living in Portland at that time. Registered in Portland with one of the Local Boards. Has the card yet. On the 8th of October, 1918, he was in Grants Pass most of the day until the evening, until 6:30, when he got on the train going north to Roseburg. Had been in Grants Pass that afternoon, in connection with his regular business, not for any other purpose. Was there to see a client. Got on the train for the purpose of going to Roseburg, where he had some business to attend to. He got to Roseburg. Didn't eat any dinner that evening. At the time he got on the train and prior to that time he was not acquainted with Henry Albers, L. W. Kinney, L. E. Gaumaunt, J. A. Mead, and only knew

(Testimony of E. C. Bendixen.)

Mr. Tichenor by sight. He had never met the gentleman. Did not have a bit of acquaintance with him prior to that evening. He had been sick in Grants Pass all afternoon. He had been sick for about two or three days. Had a very bad pain in his stomach and had taken a special cathartic, as they say, to try to relieve that pain, and when that train came in the first thing he was forced to do was to go into the lavatory, and as he came out this man, he didn't know who he was at the time, was sitting there, and that was the first time he saw him. Nobody at all was with him. He noticed by the smell of the room that defendant had had liquor, and he warned him as to having liquor in his possession, because he knew the [117] United States—this man Tichenor, was on the train, because he got on the train at Grants Pass. He stood at the station with witness, and he knew him just personally, that is only by sight. Yes, sir, he told Mr. Albers there was a Deputy United States Marshal on the train, and he told him if he had any liquor in his possession it would be a wise thing for him to get rid of it. Defendant looked up and he says, "No, they won't pinch me." Witness said, "They are liable to, and I think you would better take precaution." And defendant turned around to him and said, "Oh, to hell with him," and went down in his grip and pulled out a pint bottle of whiskey and offered witness a drink. He didn't have any further conversation with defendant at that time. He left the compartment or smoking-room then. Mr. Tichenor just came in and he did not want to get

(Testimony of E. C. Bendixen.)

mixed up with anything like that and he walked out of the place and into the rear observation-car. Yes, he returned a little later, and as he went into the car, just into the doorway of the little compartment, he met a friend from Spokane that had just come up from Los Angeles, and he and his friend were talking and they talked there a few minutes, and it was a little crowded around there and witness told him, "Let's go back to the rear of the observation-car and sit down and talk." So they went back there and sat down and talked. Later he returned to the smoking-room where Mr. Albers was. Fifteen or twenty minutes, or so; he could not say as to the exact time. As they were talking a gentleman came up and asked his friend if he was the gentleman that had been talking to this man in the smoking-car and his friend said no, and then he asked witness, and witness said, "Yes, I have been talking to him," [118] so he said, "Mr. Tichenor would like to see you up here. He said he would like to talk to you." Witness said, "All right." So he went up and then he met Mr. Tichenor the first time ever he met him in his life. He was introduced to him. Mr. Tichenor then spoke to witness and he said—he asked him if this man has made any remark—had made any seditious remark, and witness said, "No, not to me" and Mr. Tichenor says, "Do you know the man?" and witness said, "No, I don't know who he is," and Mr. Tichenor said, "I will tell you. He has been making some very seditious remarks and we think he is Mr. Albers, Henry Albers, of Portland," and when he

(Testimony of E. C. Bendixen.)

said that, why, witness said, "Is that so?" and they spoke on the matter just casually, so Mr. Tichenor said, "I would like to have you go in there and find out if he really is Mr. Henry Albers." Witness hesitated, because, as he told Mr. Tichenor, "That puts me in a very funny position, Mr. Tichenor. I have an uncle that is interested in that company of which he is president." Witness kind of hesitated, and Tichenor told him, reminded him, said it was his American duty to go in there, and witness didn't stop a minute after that, and he went right into the compartment there. When he was in the compartment before he didn't take any drink with Mr. Albers, and when he talked with Mr. Tichenor he had an understanding that if he went in there the chances were defendant would offer him a drink and he didn't want that brought up against him, if he should take a drink. He was very specific on that. Then he went in to Mr. Albers. As he went in he remembered, he kind of realized that it was a very serious business, and it was a grave—it was grave and he didn't lose his bearings, as you might say, and he went in there and he introduced himself; he introduced himself in German to him, because he can carry [119] on a conversation in German and he understood German. He had some conversation with defendant. Well, defendant made several remarks. Witness introduced himself and told defendant who he was, he told him he was Erwin Bendixen and his uncle was Peter Bendixen and defendant probably knew him. Defendant told witness that he did. He

(Testimony of E. C. Bendixen.)

thought this Gaumaunt offered them a drink. That is the way it was. Then witness told defendant right out, kind in a protective way,—he said, "Henry, you have been making some serious remarks to these fellows around here," he said, "They are remarks that are going to go hard with you." Defendant turned around in a very emphatic way and he said to witness, disregarding his warnings and everything, he said, "Once a German always a German." He talked to defendant in German entirely. When defendant talked to witness he said it in German to witness. He said, "Einer Deutsch immer Deutsch. Ich bien Deutsch im Herz." That is the way he put it to witness. Defendant made a remark about being an American, as he would say, on the outside. He said he was an American, outside, but, he said, in his heart he was German. He gave witness this impression. That is the impression he wanted witness to have by the words he used.

Thereupon, while said witness E. C. Bendixen was on the stand and being interrogated by the United States Attorney and giving testimony as a witness, the following proceedings were had:

Q. Just go ahead in your own way, without questions from me, and tell what conversation you had with Mr. Albers at that time, or what he said to anybody else while you were present.

Q. Well, then I told him, I said, "That is a terrible thing to say," I said. [120]

Mr. McCOURT.—Do I understand from you that all that conversation you had with Mr. Albers was in

(Testimony of E. C. Bendixen.)

German? A. Yes, sir, it was.

Mr. McCOURT.—He spoke German and you spoke German? A. Yes, sir.

Mr. McCOURT.—We object to that as not tending to prove the allegations of the indictment. The allegations of the indictment clearly express the idea that the conversation was all in English on both sides, and it is clearly a variance between an allegation that the conversation was had in English, to offer proof that it was had in German, and for that reason we object to the witness attempting to state what was said and translate it to the jury here. It appears that nobody understood German except this man and Mr. Albers, at the time. I may say to the Court that the rule is very well established, I think, both in sedition cases and in libel cases, that a pleading, either criminal or civil, or a libel or seditious expression made in a foreign language—the pleadings must set out the words as spoken in the foreign language, accompanied by a translation, and also that the hearers understood the foreign language. It is clear that if all the conversation there was, was between Mr. Bendixen and Mr. Albers, and that was all the evidence there was here, it would be a variance.

Mr. HANEY.—Of course we have to be bound by the Court's ruling, but I don't see that there is very much in that objection. The question is whether this man did the thing that is inhibited by the statute. If he said these things, and said them to a man registered and within the draft, and the jury believe he said it with intent, I don't see what difference

[121] it meant what language it was in.

* * * * * * * * *

COURT.—This statute is generally against sedition against the United States, and the first clause of section 3 provides, "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with the intent to interfere with the operation or success of the military or naval forces of the United States, or promote the success of its enemies." The thing demanded is the intent to interfere with the operation or success of the military forces of the United States and the means is the making of false reports. Now, I cannot conceive that it was intended by this statute that the false reports should be made in any certain language. It may be made in English. It may be made in German. It may be made in Italian, but whatsoever language it is made in, it is false reports that come within the statute. And, again, "Whoever shall wilfully utter, print, write or publish any language intended to incite, provoke or encourage resistance to the United States." Would therefore be publication in any language, and it is not confined to the English language. And then again, one of the other clauses of the statute is that "Whoever shall by word or act support or favor the cause of any country with which the United States is at war," is denounced by the statute. Now that says by word or act. The Government has tried to prove that that statute has been breached by word, and it is trying to prove now that the words were spoken in the Ger-

man language, and it seems to me that the statute can be breached by the German language as well as by English or Italian, or by any other language. This is not an act for slander or libel. It would be from my understanding [122] of the law, simply an act denounced by the Government so that the Government itself will not be damaged, by word or act, during the progress of the war. Now, there are two other clauses which are covered by the counts in this indictment, and one of them is "Whoever when the United States is at war, shall wilfully cause or attempt to cause, or incite or attempt to incite, insubordination." It does not say either shall be by words spoken or by act, but it is very well understood that it may be by words spoken or uttered, and it may be by act. Anything that will cause or incite insubordination comes within the statute. And again, "Whoever shall wilfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States." That is not based upon any words spoken or uttered. It is based upon the act itself. It may be by word or language spoken or uttered, it may be by written language, or it may be by the individual himself, so that whatever has that effect is a transgression of the law, and I think if these words were uttered or spoken in the German language, that the matter was said, and the meaning of what was said, may be stated by the witness, and that all comes within the purview of the statute. The Court will overrule the objection, and you may have your exception.

(Testimony of E. C. Bendixen.)

Mr. McCOURT.—In order that we may not make further objection, it goes to all Mr. Bendixen's testimony.

COURT.—As to that which was spoken in German, you may have your exception.

Mr. McCOURT.—Without specifically making it?

COURT.—Yes.

Thereupon, notwithstanding defendant's objection to testimony by the witness concerning a conversation carried on **[123]** in the German language, offered by the Government to sustain the charges in the indictment, the Court permitted the witness to continue and testify as follows: After witness had introduced himself, as he said, the first thing he did was to warn defendant. He told defendant he had been making some very seditious remarks to these men that were there, and witness said: "It would go hard with you after making these remarks"; "Are you sure you know what you are saying?" "Are you sure you know what you are doing?" and defendant made the remark, he said he was German, he was nothing but German, always a German. He said it didn't make any difference to him how he expressed it, you might say, and he wanted to imply—this was in German—and he told witness that on the outside, to the outside world, why, he was an American, but down in his heart he was a German, and when he made that remark, witness knew that was a very seditious remark to make, and he said to defendant, "My goodness, you don't mean that!" He said, "You don't mean to say you

(Testimony of E. C. Bendixen.)

would go to Germany and fight for the Kaiser?" Witness made that remark to him and defendant got up and he said he would go back in the morning. He says he had served the Kaiser twenty-five years and that America—he said, "I have served the Kaiser twenty-five years, and with America, shit, shit." That is just what he said to witness in German. Witness knew that much of the conversation. He didn't exactly remember. He warned defendant all the time. That is what he was doing, he was warning defendant against saying those things. Then defendant told—he raved on, you might say, and he told witness he had ten million dollars and he would spend every cent of it to lick America. Then also in this conversation he made the remark, which is a very **[124]** bad remark in the German language, it was the remark, "Schlach America." "Schlach America" in the German language, he takes the word "schlach" means to obliterate. It means to do anything to you against the country. When a man says "schlach" in German he means "schlach you," he is going to get you. This is witness' translation and that is the way it appears to him. Then after he saw defendant was of that character and he didn't care what remarks he had made, and would make any threat on us, witness walked out of the compartment and went back to Mr. Tichenor and told him the things that had been said and Mr. Tichenor said: "Well, he has been saying that to all these men," and Mr. Tichenor said, "There must be some more to this. Defendant has been

(Testimony of E. C. Bendixen.)

down in San Francisco and he must have been conspiring down there, making a contract or something." Then he asked witness if he would not go back and see if he could get some more—some dope, as he called it, as to contracts or something defendant had been doing down in Frisco. Witness went at once and he talked to defendant and tried to talk to him about several different things and then asked defendant if he had anything like that to do—had done anything like that, and he said no, he hadn't had anything to do like that. He said, he looked at witness, you know, out of the corner of his eye, like this, "Nein, nein." You understand that means "No, no," and he would not talk any more. During his talks with defendant, before that, there were one or two things that probably should be brought up in this case, in regard to that, after witness had introduced himself to him—why, he introduced himself in German, and defendant told him that—in German—"Du bist ein ecte Deutscher," or "You are a genuine German." Also **[125]** during the conversation defendant told him that his brothers were also pro-Hun. Well, he said German, which means the same thing. He didn't say pro-Hun, he said German. He said they were German. He also told witness of some trouble, he knew of some trouble or revolution which would appear in the next ten years, yes, five years, yes, to-morrow, he said. After he told witness this "nein, nein," or "no, no," then defendant told witness that he wanted to go to bed, and he went up to the porter and told the porter that he wanted

(Testimony of E. C. Bendixen.)

to go to bed; then witness went to the rear of the observation-car again. When defendant spoke about Germany winning this war he made the remark, "Wir haben Krieg gewonnen," that means, "We have won the war." He expressed himself that he was willing to go back—he was going back in the morning. He told witness he had ten million dollars and that he would spend every cent of it to whip America. Witness got off the train at Roseburg about an hour later. He reported to Mr. Tichenor what he had heard in that room and made a memorandum of it himself. He went to Marshfield from Roseburg and stayed in Marshfield, he thought, a week, and then he came on into Portland. After coming into Portland he saw Mr. Goldstein and was subpoenaed as a witness before the grand jury, and later testified before the grand jury. He was not acquainted with Mr. Albers prior to that time and never saw the man. This uncle of his tells him that he was formerly, or is now, a stockholder in the Albers Company. Witness had no personal connection with the Albers Company. Never had been employed by them and never had any business relations in the way of adjusting insurance or anything of that kind with them. He did not ask Mr. Albers as to how he intended to help Germany. **[126]**

The testimony thus given by the witness following defendant's objection and exception duly allowed by the Court in permitting the testimony of the witness relating to conversations carried on in the German language, were covered by defendant's said objec-

(Testimony of E. C. Bendixen.)

tion and his exception to the ruling of the Court in allowing the introduction thereof.

Upon cross-examination the witness testified: That he was not advised against his will to go in there. He did not see the impropriety of going in there. He said it put him in a peculiar position. It came into his mind the very first thing, absolutely, yes, sir, that it wasn't a very nice thing for him to be going into the room with a man who was intimately connected with his relatives in a business way. He didn't know that he thought it was improper—it was in a way a protection. The thought came to him naturally in the way of objection. It didn't come into his mind that the fact that his uncle and these people were associated in a business way would kind of throw suspicion on his story when he undertook to tell the story that he would learn from that man. It was just a thought that came over him, a natural thought of protection, because he knew his uncle was interested in the thing and it was a natural thought of protection. That is the way he would put it. The idea was this, it would certainly cause a great stir with the Albers Brothers Milling Company. It would reflect upon them, would naturally reflect upon him, and he thought of it in that light. He certainly did like his uncle very well. He knows Wesley Neppach. Wesley came to his house a couple of days after this thing happened. Had a conversation with witness in the presence of witness' wife. Oh, no, he didn't tell Wesley at that time that he [127] had fixed his uncle's stock plenty, and that he thought of tell-

(Testimony of E. C. Bendixen.)

ing Fred Jacquelin to dispose of his stock, or that he thought of telegraphing to him to do that, but had concluded that he would not do it, or that he better get rid of his stock as quick as he could. He did not say that. That was only in a way of protection. He knew that this thing was hurting Albers Brothers Milling Company, could not help but hurt them, and he told them in a way of protection. That is all he did; he didn't make any remark like counsel put it. He said to Wesley that he probably ought to telegraph to Uncle Wes. and Fred Jacquelin. Thought on account of this deal it would probably go hard with him. They didn't know anything about it. It was a way of protection. They should probably take care of their stock if they wanted to protect themselves. If they wanted to sell it, or do anything like that, but he didn't do it. He went into that room in the light of protection to Mr. Albers more than anything else. He had one or two drinks with him, yes. He did not make any arrangements to drink with him before he went in there. He said naturally Mr. Albers would ask him to have a drink, and he wanted to know Mr. Tichenor didn't get him in wrong because he took a drink. That is what he told Mr. Tichenor. Mr. Tichenor told him it didn't make any difference to him. Yes, he knew that he was violating the law when he drank that booze. No, he wasn't willing to do that to entrap defendant. He did not look at it that way at all. He went in there because when this man Gaumaunt came to him he showed him—showed them a deputy marshal's

(Testimony of E. C. Bendixen.)

badge, and when witness went to Mr. Tichenor, why, he was among detectives, and he thought this was a kind of detective game and he made up his mind right **[128]** then and there that probably these detectives, who were very zealous sometimes, were trying to put something over on this man, and he went in there in that light and he even talked German to him to hear what he had to say to be sure he gave him a square deal on the thing. He did that. That was his full thought when he went in there. He didn't take him and put him to bed and say: "Go to bed and keep your mouth shut, you old Dutchman, or I will put a plaster on it," because these other fellows had the goods on him, they said, and witness went to find out if true. He certainly was defendant's true protector. He gave him good protection, although he may be cussed for it. That is the size of it.

Testimony of Olga Gomes, for the Government.

Thereupon OLGA GOMES was called as a witness in behalf of the Government, and being first duly sworn, testified as follows:

She lives in San Francisco. Lived there two years. Prior to that lived in Portland all her life. She is a manicurist at the Sutter Street Barber-shop. Connected with the Sutter Hotel. She met the defendant Henry Albers twice in the barber-shop there. The first time was in the spring, around April of 1918. Had never met him before. Manicures nails. Mr. Jack O'Neill introduced her to him.

(Testimony of Olga Gomes.)

That was the first time she ever met Jack O'Neill. Mr. O'Neill wanted her to meet defendant and manicure him. Mr. O'Neill and she talked about the people in Portland that they knew and mutual friends in Portland, also Milwaukie, Oregon, where she used to go to school. Yes, sir, that is the place where Mr. Albers had a home. Yes, sir, he spoke of his home there. She manicured Mr. Albers about one o'clock. She was supposed to leave the barber-shop to get off at one o'clock, and Mr. O'Neill told her if she would stay and manicure Mr. Albers that they would [129] take her home in a taxicab, because she had a luncheon engagement at her home at about a quarter to two. While she manicured Mr. Albers they talked about mutual friends they had in Milwaukie. She went to school in Milwaukie when she was a young girl. Graduated there from the Milwaukie school and they both happened to know several people there, namely, Mr. Streib, Miss Lizzie Streib and Ruth Luchler. The defendant was telling her that he bought some property from Miss Ruth Luchler's mother and he was telling her he paid so much down on the home and he was paying her fifty dollars a month so that Miss Luchler's mother could go back and live with her in New York, or some place in the east; and he spoke about how he was going to fix up this little place and told her about some China pheasants he had and was taming, and how much pleasure he got out of these China pheasants. As they were talking, having this conversation about different people out in Milwaukie somebody picked up the

(Testimony of Olga Gomes.)

paper and started to read something about the war. Something was mentioned about the war there and Mr. Albers changed right away. Changed his line of conversation and started to—one thing she remembered, he stated very distinctly that he was a Kaiser man from head to foot. When he said that she started to—she didn't like to see him talking about the war, so she tried to change the subject, but he went on talking. She didn't remember the distinct remarks that he said in the proper shape because she didn't like to hear him talking about that, so she tried to change the subject and talk about these people again in Milwaukie. Nobody heard it but witness. He just addressed himself to her. He was very much in favor of Germany. The only distinct remark she remembered him making in the proper shape **[130]** was that he was a Kaiser's man from head to foot. They left in about half an hour after she started to manicure him. Mr. O'Neill and another lady went out with them; thought her name was Miss Wade. Didn't hardly remember. They met her up on Post Street. They said they would take her home and on the way up there they asked her to go out for a little ride with them. They had planned a little ride for the afternoon and they induced her to go on this little ride with them. She didn't think there would be any harm, so she said yes. After she had manicured Mr. Albers he went into the bar for a minute, or a few minutes. She could not say what condition he was in when he came out of the bar, but he was walking very straight. That she observed.

(Testimony of Olga Gomes.)

No outsiders would know he had been drinking. When they got into the cab they rode right up Sutter, then on to Post. She was sitting alongside Mr. Albers in the taxicab. Mr. Jack O'Neill was with this Miss Wade on the two little seats. It must have been around two o'clock. After getting Miss Wade they rode out on the Highway as far as the Stanford University, then they turned around, rode through the Stanford grounds, then rode around and came back. Stanford University is at Palo Alto. Didn't know how many miles from San Francisco. They didn't stop off any place on their way to Stanford University. Remembered defendant making the remark, she remembered it so well because it impressed her so at the time, he said that, "I am a millionaire and I will spend every cent that I have to help Germany win the war," and then he pounded on his knee and made this remark in German, "Deutschland über alles," and just as he made that remark—well, they were approaching the grounds there, and Miss Wade said, "I wish you would shut up, because we might [131] all be interned," and then he said, "I don't care; I am a spy; I am a spy and I am ready to be shot right now for Germany"; and another remark she remembered very distinctly was, "There will be a revolution in the United States." He said the Kaiser was the smartest man in the world and that the President didn't have any brains. The only effort to restrain defendant from further conversation was that made by Miss Wade. After leaving Stanford University they came di-

(Testimony of Olga Gomes.)

rectly home over another route. She didn't know the name of the highway; didn't remember. He took her right home, where she arrived somewhere around six o'clock. Did not stop off at any place on their way back. There was lots of conversation but she did not remember it all. Just remembered these remarks, because it impressed her so that she could never forget them. They made her so mad and she felt like fighting, but could not, being a guest. They worried her for a long time, for quite awhile. They worried her very much that night; she could hardly sleep. They worried her so much she didn't know what to do about it herself, so she confided in one of her customers and asked him what he thought about it and he said, "Why, report it right away, by all means." He said, "If you don't I will," so to save her the trouble he says, "I will do it to save you the embarrassment of going down there," he says, "I will do it for you," so he did it for her. Reported to the United States Attorney in San Francisco about two weeks later, and this took place some time in April, 1918.

On cross-examination the witness testified she never saw Mr. Albers before in her life. She lived in Milwaukee as a girl; was reared there. She married in Portland. Is not married now. Her husband is not dead, [132] but divorced. She is a manicurist living in San Francisco. Does not know Mr. Albers' sister. Is not of German ancestry. Is Russian. Her father and mother were born in Russia. She was brought up in Milwaukie. Understands one or

(Testimony of Olga Gomes.)

two words of German. Her folks as long as she can remember always spoke English. The language she first learned was English. Her father and mother spoke English at home. Has two brothers and three sisters. She is the fourth of five children. The only language that was spoken in their home was English. Her mother and father were born in Russia. They were Russians. They spoke Russian. They were born in a part of the country where she was told they called it low German or something. They spoke partly Russian and partly German. She had talked a good deal to Mr. Goldstein about this case. A good many times. Could not say the exact number. Didn't stop to count. Could not say whether five times, six times, seven times, ten times. Mr. Goldstein is the attorney. Talked this case over with her all of these ten times, yes, sir. To keep it refreshed in her memory, she supposed. Her maiden name was Olga Drefs. Mr. Albers was not asleep all the time when out on this ride. He dozed off once or twice. No, she would not say he was drunk, because he talked intelligently on different subjects suggested about these people in Milwaukie, and all that. Didn't know he had been on a protracted spree for fifteen or twenty days at that time. She never talked to anybody in the barber-shop about Henry Albers. Didn't at that time; did afterwards. Yes, she heard he was a man who went off on periodical sprees. Heard that afterwards from Mr. O'Neill. She didn't hear that he had ten million dollars. He told her that he was a millionaire.

(Testimony of Olga Gomes.)

Didn't know whether he was. She had heard of the firm so many years and it seemed to her [133] she had always heard they were millionaires. Thought they were millionaires. Never heard they commenced here as poor boys and that they are doing business here on money largely that the banks furnish them until she came down here. Read it in the papers, she thought. Somebody told her the same thing.

Testimony of Henry Cerrano, for the Government.

Thereupon HENRY CERRANO was called as a witness on behalf of the Government, and, being first duly sworn, testified as follows:

He lives at 210½ Montgomery street, city of Portland. Has lived in Portland eleven years. Is a married man; has got a little girl. Born 1879 in Italy. Is a naturalized citizen. Was naturalized January 2, 1915. His father was an Italian. His mother was a French woman. His occupation is that of janitor, cleaning windows. Knows the defendant, Henry Albers. Has been cleaning windows about four years for Albers Brothers. Recalled hearing Mr. Albers make a statement concerning the war. That was before October, 1915.

Thereupon defendant interposed an objection to the introduction of testimony of the witness concerning statements alleged to have been made by the defendant before October, 1915, as follows:

Mr. McCOURT.—I object, your Honor, to any statements back that far as not tending in any way

(Testimony of Henry Cerrano.)

to establish any issue in this case. The question, and the only question that can come up when other statements are offered is the one of intent, and there can be no such intent as is involved in this case existing or arising at that particular time, and consequently [134] any statement that was made at that time would have no tendency whatever to show that Henry Albers had an intent that was impossible to exist at that time when he should have made the statement—at that particular time. Besides that we object for the reason that it is too remote.

Respecting the objection thus interposed the Court made the following statement and ruling:

COURT.—I think it is perfectly competent, not to show the defendant was guilty of the offense charged in the indictment, but for the purpose of showing the intent in the defendant's mind, and in that way assist the jury in determining the intent of the defendant in doing what he is charged with doing. For that reason the Court will overrule the objection and allow this to go to the jury.

Defendant duly excepted to the ruling of the Court, which exception was duly allowed by the Court.

Thereupon counsel for the defendant made the following statement:

Mr. McCOURT.— * * * We have never doubted that this man was strongly pro-German before we entered the war. There will be no dispute about that here.

(Testimony of Henry Cerrano.)

Thereupon the attorney for the Government made the following statement:

Mr. GOLDSTEIN.—With the understanding that this testimony is offered to prove intent, and for that purpose only.

Thereupon the Court permitted the witness to give the testimony sought to be elicited by the Government, and said witness continued to testify as follows: No, it was before October. He didn't know exactly which month. It was before October, because in the month of October he quit washing windows for Mr. Albers. He could not exactly remember the time it [135] was before October. He was just cleaning the windows in the office of the Albers Brothers Milling Company. He saw the defendant Henry Albers there in the office. Well, he saw Mr. Albers once. He came in the office with a German-American paper and he gave this paper to a young gentleman who was working at a typewriter machine and giving this paper he says: "Look at that paper. See what the German army is doing. The German army is doing wonderful and France and England come very easy." And then Mr. Albers went away from that room and the only words I heard after that, I heard these two words: "One Kaiser and one God." He didn't understand well what defendant said before, if we were to have one Kaiser and one God, but he is sure of the statement, "One Kaiser and one God." He heard very well them two words.

On cross-examination the witness testified that he

(Testimony of Henry Cerrano.)

told this to nobody. About twelve people worked in the office. He didn't know when Italy went into the war against Germany and Austria. Didn't pay any attention to that. Yes, sir, he knew Italy was lined up with Austria and Germany in a treaty alliance and that Italy left this alliance and went to the allies. He is an American citizen, is very strong for the United States. He never told anybody about this except Mr. Rutto. He is the landlord of the hotel where witness lives. He is an Italian. He died in January, 1917, three or four months before America entered into the war. All he remembered, the same day, when his day's work was all over, he went home and spoke to Mr. Rutto. He said, "Mr. Rutto, I heard this and this in Albers' office," and Mr. Rutto say, "Certainly the Albers Brothers are very pro-German, because they are German themselves." That was the first time witness knew the Albers [136] Brothers were Germans.

Thereupon the Court confirmed its allowance of an exception to the ruling of the Court denying and overruling defendant's objection to the testimony of the witness Henry Cerrano.

Testimony of N. F. Titus, for the Government.

Thereupon N. F. TITUS was called as a witness in behalf of the Government and, being first duly sworn, testified:

That he lived in Portland twelve years, prior to which he lived in San Francisco, where he was born. He is now in the water transportation almost exclu-

(Testimony of N. F. Titus.)

sively. He is a married man and has a family. At the present time he is with the Spruce Production Division of the United States Army, where he has been employed seven months. Prior to that he was employed by the Columbia Navigation Company and prior to that by the Elmore Company of Astoria. He has his headquarters and business office on Albers Dock No. 3, adjoining the mill of the Albers Brothers right next to and immediately north of the Broadway bridge. He has been there between three and four years. Has known Henry Albers personally about three years, possibly more. Has seen him very frequently. He saw a great deal of Mr. Albers all during the year of 1917 and the early part of 1918, up until approximately March 1st, possibly a little later. In January and February, 1918, the schooner "Oakland," belonging to Mr. Albers, was moored at the Albers' dock No. 2 and she was being outfitted and Mr. Albers was around a great deal of the time that he was being fitted out, and his office being located there, why, he saw a great deal of defendant. Yes, he had conversations with Mr. Albers during the year 1917 and [137] covering a considerable portion of the year. These conversations occurred on the Albers dock this city. To the best of his recollection they commenced in about January —either January or February, 1917. He had conversations with him concerning the great war.

Thereupon the witness was asked the following questions by counsel for the Government:

Q. I wish you would tell the jury, fixing the time

(Testimony of N. F. Titus.)

as best you can, when you had conversations with Mr. Albers concerning the war, if any, and what he said.

Thereupon defendant interposed an objection to said question for the reason that the same was incompetent, irrelevant and immaterial.

The Court thereupon propounded the inquiry to counsel for the Government:

COURT.—Is the purpose of this evidence of this witness at the present time to show the bent of the defendant's mind?

To which inquiry counsel for the Government replied:

Mr. GOLDSTEIN.—Exactly; as to anything that might have been said before the Espionage Act was passed.

Thereupon the Court ruled as follows upon defendant's objection to the testimony sought to be elicited from said witness by the Government:

COURT.—With that understanding the objection will be overruled.

Thereupon the following colloquy between counsel for defendant, counsel for the Government and the Court ensued: [138]

Mr. McCOURT.—May I ask whether or not the proof is directed at this time to the last three counts or to the first four counts in this line of examination?

Mr. GOLDSTEIN.—Naturally the testimony given as prior to June 15 would be for the purpose of proving the intent with which the utterances of the first four counts were made, but as to anything that

(Testimony of N. F. Titus.)

was said after June 15, 1917, it would go to prove the exact charges in counts 5, 6, and 7 of the indictment.

COURT.—Very well, with that understanding you may proceed with this testimony.

Mr. McCOURT.—We wish our exception to the Court's ruling but would like to have it understood that we object now to the direction that is being given the testimony for the reason that it is incompetent, irrelevant to prove intent, being prior to the time an intent of the crime could arise. It is the same objection we made to a former witness' testimony.

The Court thereupon overruled defendant's said objection, to which ruling defendant duly excepted and defendant's exception was allowed by the Court.

At the time of making the last mentioned ruling the Court made the following observation, assented to by the Government:

COURT.—As I understand it, this testimony is offered for the purpose of proving the intent of the defendant.

Thereupon the witness was asked the following question by counsel for the Government: [139]

Q. Now, Mr. Titus, what conversation did you have with Mr. Albers concerning the war, commencing about January or February, 1917, and running up to June 15, 1917?

Thereupon counsel for defendant inquired whether defendant's objection and exception would go to all the testimony sought to be elicited by the foregoing question, and was answered by the Court in the affirmative.

(Testimony of N. F. Titus.)

Thereupon the Court permitted the witness to answer the question, and, continuing, the witness testified: That the conversations he had with Mr. Albers were numerous and he was unable to fix any definite day during that entire period when any particular conversation took place. He recalled very distinctly the nature and substance of the conversations, and to begin with, the first point that came to the mind of witness was the discussion of Belgium and other atrocities, this topic arising from the current newspaper comments. In discussing those features, that particular point with Mr. Albers, he uniformly made the statement that they were all lies and that the reason they got them in that shape was that the press of America was dominated by the English press, and that if we wished to get the truth of the situation we should read the German newspapers. He further discussed the trouble that the United States was having with Germany, the Imperial Government of Germany, respecting the various points at issue at that time, the exchange of notes which followed—and he believed—stated himself that the United States was misled in their position and the fact that they were misled was due to the influence of the British press [140] and on numerous occasions emphasizing that point. Defendant frequently discussed the conditions in Germany, his visits over there, his great liking for the condition of living in Germany, the fact that the people there enjoyed life better than they do over here, and in discussing the life in Germany he frequently mentioned, or made comparisons between

(Testimony of N. F. Titus.)

the institutions in this country and the institutions in Germany, laying particular emphasis on our forms of municipal government, speaking of our State Government—its efficiency, etc., and in comparison of the national forms of government, and in every particular case in these comparisons emphasizing the point that he liked the form of government in Germany better than he did over here, feeling that the forms of government here were maybe swayed by party action, political action, and selfish ends and that the German forms of government were more efficiently and more ably and more conscientiously administered. That occurred along the first part of the year 1917 on numerous occasions. Defendant frequently mentioned at that time that the people in Germany enjoyed life more than they did over here. Well, the first thought that occurred to the mind of witness the first time defendant mentioned that was that he spoke of the convival spirit of the people over there. He said they would go to a church on Sunday morning. After church they could meet around at a little beer garden and sit around and play games and have a good time and he felt that the people there enjoyed life more than they did here. It was impossible, witness said, for him to tell whether these conversations took place in April, May, June or July, but the [141] subject was up a number of times and defendant reverted back to the old primary consideration that defendant believed that we in this country was dominated by the British press. That seemed to be a particular hobby of his and he con-

(Testimony of N. F. Titus.)

stantly referred to it and reverted to it, stating that we were misled by the British press and he felt that we were not justified in going to the length that we did in actually entering the war.

Thereupon the witness was asked the following question by counsel for the Government:

Q. Mr. Titus, you were about to fix a date wherein a certain conversation with Mr. Albers concerning the ability of the United States to cope with Germany occurred and you said that you could not fix the exact date, but by associating it with some incidents you could approximate the date. Will you proceed now?

Whereupon, the witness having started to answer the question last propounded, saying: "The method by which I associate it is this," he was interrupted by counsel for defendant, and the following colloquy between counsel for defendant and Court occurred:

Mr. McCOURT.—Our objection and exception goes to this question, your Honor?

COURT.—Yes, you may have your objection and exception.

Mr. McCOURT.—And to all similar testimony.

COURT.—Yes.

Thereupon the witness continued and testified: His permanent office on Albers Dock No. 3 is on the lower dock. During the summer months and occasionally during the winter months the river rises to such a stage it is necessary to move to the [142] upper dock occupying the old office of the American Hawaiian Steamship Company, and he had his

(Testimony of N. F. Titus.)

quarters in that office during the month of June and up to the 20th day of July, approximately seven weeks. While he was in that office occupying that quarters Mr. Albers on several occasions dropped in and had conversations with him. And his distinct recollection was that this was one of the topics that he discussed during that period. The conversation arose from a discussion of preparedness of the United States, or, rather the unpreparedness of the United States as contrasted with the preparedness of European countries—the fact that they had long maintained standing armies and in this further that the youth of those countries had been put through a compulsory term of military service, and Mr. Albers, commenting on that, drew the comparison that our soldiers were really amateurs going up against professionals in this war and he doubted under the circumstances if we could beat the German army in a thousand years. This conversation took place either during June or July but his honest belief was that it took place during July. As he recalled the conversation at that time, the day was very hot and it was well on into summer. He had further conversations after that date, both in that office and when he returned to the lower dock to his former office. He returned about the 20th of July to his former office, where he continued to have conversations with Mr. Albers. It was difficult for him to fix the date because during the entire period from July 20 on to March 1, 1918, a period of seven months, he [143] could not recall, had nothing to associate the

(Testimony of N. F. Titus.)

conversation by, like he had moving to the upper dock. He knew though that he had a number of conversations. Whether they took place in August or September or December he could not recall at this time. But he recalled he had a number of conversations. He expressed it as his honest belief that they went over the same conversations several times and these same points that he had testified to occurred in the fall of that year and in the spring of the year 1918. The witness testified he could distinctly recall that after July 20, 1917, mention was made of the fact that we were dominated by the opinions advanced by the British press and that the stories of the Belgium atrocities and similar occurrences were lies. He further advanced the statement that if we wished to get the truth we should read the German papers. This was the topic that came up on several occasions. He did not recall it happening on this so-called hot day in July but did recall distinctly that it was after the war—after we went into the war. They might have been all the same conversation, they might have been different. He had so many conversations it was difficult for him to identify any particular one now. As a matter of fact Mr. Albers' visit in his office sometimes covered a period of 2 hours and during the course of 2 hours they discussed a great many things, so that he would say that a great many of those conversations embraced several of these topics. His recollection on this conversation about the armed forces of the United States was to the effect that there was a gentleman present. He

(Testimony of N. F. Titus.)

felt that in this [144] particular case he could recall in his office there were two chairs there, Mr. Albers occupied his chair, another party occupied another chair and witness stood against the wall desk. Witness came back from lunch and found these two gentlemen sitting there and stood against this wall desk and listened there. Witness stated that his recollection was that this conversation took place at this particular time and the conversation terminated by Mr. Albers asking him if he wished his chair. They had been conversing some time and witness told defendant yes, that he needed his chair, he had to go to work. So in that way witness felt that he could associate this particular conversation. The other person present, as he recalled it, was a man by the name of Smith who is now in the United States army. After July of 1917, he could not fix the exact date, but he remembered that they did discuss the United States Food Administration. They were discussing the various rules and regulations.

Thereupon counsel for defendant addressed the Court concerning defendant's objection and exception to the line of testimony being given by the witness as follows:

Mr. McGINN.—Our exception goes to this all, your Honor, I suppose.

COURT.—Yes.

The witness, continuing, testified: The matter of substitutes etc., and Mr. Albers advanced the idea that the Food Administration was outrageously and ridiculously conducted or organized. The point he

(Testimony of N. F. Titus.)

made was this, that the men in charge were not food people and in order to get expert [145] assistance or to form an advisory board they would have to bring together some of the larger eastern food manufacturers or dealers in food products and on that account these men in giving their advice would probably be led by selfish ends and in the end the inexperienced man in charge of the Food Administration would be led to acts that would rebound to the benefit of the food manufacturers or food brokers in the east and that on that account the Administration would not be properly or conscientiously administered along the lines that it was intended. The discussion concerning a revolution in this country seemed to be quite a hobby of Mr. Albers. He mentioned that on several occasions. The witness recalled that he mentioned it after July 20, 1917. He believed the last time that defendant mentioned that was during the winter of 1917–18. Defendant made the statement that he felt that we were on a verge of revolution; in other words, that we were living on a volcano and disturbances of a violent nature might break forth at any time. No, he could not specifically state that any discussion was had between himself and Mr. Albers about the Kaiser or our ability to overcome the Kaiser. The conversation about overcoming him took place in the office upstairs that he mentioned during June and July, mentioned the success of our armed forces. Witness expressed the belief that there were other conversations but he could not swear to it at this time. Witness stated

(Testimony of N. F. Titus.)

that candidly his recollection was that the discussion wherein the justification of America's entrance into the war was discussed by Mr. Albers took place [146] in the upper office, the American Hawaiian office, during the last of June or the first part of July. The discussion at that time reverted simply to the old topic of the domination of the English press and he stated he felt that we were not justified in entering the war. We were misled by the British propaganda. The witness testified he was forty years of age October 24, 1918. He registered in the draft and is not yet classified. That his recollection was that these conversations with Mr. Albers ceased about March 1, 1918. The witness stated that his recollection on that score was that during the months of January, February, 1918 defendant was outfitting the schooner "Oakland" at the adjoining dock Albers dock No. 2 and after the schooner "Oakland" was outfitted he saw very little of Mr. Albers. Witness further fixed the date by his efforts to dispose of a coil of rope that a friend had left with him to Mr. Albers, which coil of rope witness dispatched to Newport for use in connection with a wrecked vessel on March 2, 1918. The witness was not cross-examined.

Testimony of G. M. Wardell, for the Government.

Thereupon G. M. WARDELL was called as a witness in behalf of the Government, and, being first duly sworn, testified as follows:

He has lived in Woodlawn, Portland, a little over

(Testimony of G. M. Wardell.)

a year, was 36 years old the 29th of last August. Registered for the first draft. Is a married man with a family, wife and 3 children. He is in class A–1. He knows the defendant Mr. Albers. The first time he ever saw Mr. Albers to know him was over at Wheeler in Tillamook County, on the West coast of Oregon. Witness was over there for the District Attorney of Tillamok County, making some investigations over there on the illegal sales of liquor. [147] He was employed as a special investigator. When he saw defendant he was at a place called Oscar Carlson's over at Wheeler. It formerly was a saloon but it was a soft drink and box alley there—something. Mr. Albers was in there playing box-ball and witness was in there and the papers came in off the train and there was some remark, something in the papers about the blowing up of the ship by one of the German submarines and Mr. Albers made the remark that when the Germans got well organized that with the submarines there would be no chance for any boats to go across and that—in substance, he thought defendant said that he hoped they would blow every British ship out of the water. He wasn't absolutely sure as to the date when this conversation took place. It was some time between now and the middle part of February of 1918; if he wasn't mistaken about the middle of February, 1918. Witness was just recovering from a illness.

On cross-examination the witness testified that he was collector at the present time. Worked for the

(Testimony of G. M. Wardell.)

Eilers people up to a short time ago, collecting installments. He was over in Tillamook as a special investigator. That means a detective. He was a detective for a while. At that time he had been working off and on, every once in awhile he would get a job of that *time* and he *had* would do it. He was working independent at that time. He was an independent detective. Didn't take divorce cases. He had looked up soft drink places to find out whether there was any booze in them. Was paid by the county and by the sheriffs. He hadn't done work for the anti-Saloon League for a good many years. Yes, he had worked for them as a detective, investigating. He didn't make his living that way. He didn't report his conversation with [148] Mr. Albers to anyone in particular. They found it out in some way and Mr. Watkins came out to see him about it. Elton Watkins. He is associated with the Secret Service Department of the United States Government. Witness didn't know how Mr. Watkins found it out. Came out to see him at his home on East 10th North about 10 days ago. He didn't write the conversation out at the time. He guessed he had told somebody about it before he told Mr. Watkins. He didn't remember, but made the remark to somebody—Oh, a long time ago. Guessed that he heard those remarks. He recalled that he heard Mr. Albers say over there at Tillamook he hoped the submarine warfare would blow every British vessel out of the water. That was the substance of it and he remembered that and told Mr.

(Testimony of G. M. Wardell.)

Watkins that. Mr. Albers was over there in the interest of a boat that they had over there trying to get it off the ways.

Testimony of David McKinnon, for the Government.

Thereupon DAVID McKINNON was called as a witness in behalf of the Government, and, being first duly sworn, testified as follows:

At the present time he lives in Portland. Has lived there about four months. Prior thereto he lived in San Francisco. All his life, all but four months. At present he is superintendent of construction of the Standifer Steel Company in the city of Vancouver, where he has been employed four months. He knows the defendant Henry Albers, somewhat. Met him, should say about eight years ago in Portland. Witness was travelling through Portland, that is, travelling throughout the coast then for the American Smelting and Refining Company, with which he was employed in the capacity of engineer and salesman. In that capacity he met Henry Albers and became [149] somewhat acquainted with him. He met defendant in San Francisco after the world war and had the discussion concerning the war. Witness fixed the time at about two or three months after the war first started. In September, or October, or November, 1914, somewhere in that locality. There were standing at the corner of Sansome and California Streets at the time this conversation took place. Witness was looking at a new building under course of construc-

(Testimony of David McKinnon.)

tion. Defendant happened to come up unexpected and started talking with witness where he was standing. Defendant accosted witness. Witness didn't see defendant.

Thereupon counsel for Government asked the witness the following question:

Q. Just state the conversation that took place concerning the war.

Thereupon defendant interposed the following objection:

Mr. McCOURT.—The defendant objects to the testimony sought to be elicited from the witness for the reason that it is of a time long prior to the entry of the United States into the war and under circumstances entirely different from the circumstances under which the allegations in the indictment, or the charges in the indictment, or the statements in the indictments, are said to have been made. Therefore it is immaterial and also too remote.

Thereupon ensued argument by counsel, after which the Court ruled upon defendant's objection as last interposed and in connection with his said ruling instructed the jury as follows:

COURT.—This testimony is offered, not to prove the acts **[150]** that are alleged against him constituting the offense, but to prove or to show, if the testimony has that effect, the intent or not the intent but the bent of the defendant's mind or his attitude towards this country and towards that of Germany, and it will only be admitted for that purpose and none other, and it is admitted bearing upon in-

(Testimony of David McKinnon.)

tent so that the jury is put into possession of the bent of mind or of the attitude of the defendant prior to the time when these acts are alleged to have been committed, to enable them better to say what his intent was and by considering all the testimony in the case, and I will admit it for that purpose. I will say to the jury now that this testimony is not admitted for the purpose of proving the allegations in the indictment or any of them by which this defendant is charged with the offenses therein stated, but it is admitted for this purpose and this purpose only as tending to show the bent of mind of the defendant or his attitude towards this country as compared with his bent of mind and attitude towards the Imperial Government of Germany, and is for the purpose of aiding you, taking it in connection with all the testimony that will be offered in the case, to determine what his intent was if it be proven that he has made the statements which it is declared by the indictment he has made, and by taking this in connection with all the testimony in the case it will aid you in determining what his intent was in making such remarks or in making such statements as may be proven to your satisfaction beyond a reasonable doubt.

Thereupon the defendant duly and regularly excepted to the action of the Court in overruling defendant's objection to the testimony sought to be elicited by the question last [151] propounded to the witness by counsel for the Government, and also saved an exception to the Court's instructions to the jury concerning the effect of the testimony and its pur-

(Testimony of David McKinnon.)

pose, which said exceptions were duly allowed by the Court.

Thereupon the Court permitted the witness to give the testimony sought to be adduced by the Government, and, continuing, the witness testified: Well, at the time he was looking at the building that was under construction when Henry Albers happened to come up unexpected and he passed a remark asking witness what he thought of the building. Well, they passed a few little pros and cons regarding it when the subject—well, defendant mentioned his views, witness mentioned his. Then defendant brought up the subject of the war, asking witness what he thought of the war. So witness told him that he didn't want to have much to say about it, that it was something that he was very sorry it had to happen, and furthermore he thought it was too bad at this stage of the game, at this present time, that we could not settle our national disputes in other ways beside bloodshed. Then Henry Albers says to witness, "What do you think of our British cousins?" Witness said, "No British cousins of mine; nothing of British who are cousins of mine."

Defendant then said "Never mind; before we get through with them, we will kill every man, woman and child in England." The witness then testified that he said to defendant, "Henry, you have said enough about the war to me; don't ever mention war to me again." Witness had seen defendant since that time but never talked to him. He was sure defendant used the word "we will kill every man,

(Testimony of David McKinnon.)

woman and child." He didn't report this [152] utterance of Mr. Albers to any Government officials until we went into the war. He has a wife and child of his own and felt defendant would do the same in that regard. He reported the matter to Casper Onbaum, Assistant District Attorney in San Francisco.

On cross-examination the witness testified he knew Mr. Albers prior to this conversation with him, off and on for eight years. The conversation took place in 1914 and he had known defendant about three years before that. Had never worked for him. He knew him through Jack O'Neill, who introduced them. Witness was working for the American Smelting and Refining Company. He reported the conversation after the war, he said, as he had a wife and child of his own. He didn't want the same thing to happen to his wife and child that was going to happen to Great Britain. He thought defendant was partly responsible after he made that remark; sure, yes, sir. He felt strongly against Mr. Albers, as he is American born and has been American all his life. He thought that was a very unmanly remark for a supposed-to-be American to make. Witness' ancestry is Irish and English-Scotch. His father came from Montrose, his mother from Ireland. He is more Christian Scientist than anything. His father was Presbyterian, his mother Catholic. He was brought up a Catholic. Knows Jack O'Neill only just meeting him casually on his trips through Portland. He thought it his duty as an American to report this conversation. He didn't report it before

(Testimony of David McKinnon.)

America went into the war; not until after America went into the war. About three years after. It stuck in his craw ever since. He reported it because he had a wife and child of his own. They could kill him but he didn't want to see his wife and child [153] killed. No, he didn't think the German people as a people had been bereft of reason and that they didn't like their wives and children. He always thought better of them. Witness testified that he understood the English and the Germans became cousins through royalty. Mr. Watkins came to see him at his home, 711 Glisan Street. He didn't know who told Mr. Watkins about it. He had no feelings against this man.

Thereupon the Government rested.

Testimony of Wesley Nippolt, for Defendant.

Thereupon WESLEY NIPPOLT was called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

He is a millwright. Has been working up at Cheney. Came here under subpoena. Knows Erwin C. Bendixen. Has known him since he was a little kid. Knows his father and his uncle. On or about the 10th day of October, 1918, at the home of Mr. and Mrs. Bendixen, in this city, county and State, Mr. Bendixen stated these facts to witness: "I have fixed my uncle's stock plenty. You know Fred Jacquelin. Tell Jacquelin to get rid of his stock, for it won't be worth much for a very great while longer," or words to that effect. And at that

(Testimony of Wesley Nippolt.)
time Mr. Bendixen said to witness that he considered the entrapping of Henry Albers in this case as his bit towards the war, or words to that effect. Mr. Bendixen said at that time that before he would go into the room where Henry Albers was that he had an agreement with Mr. Tichenor, Deputy Marshal, by which he could drink as much whiskey as he wanted to without being charged with any criminal offense.

On cross-examination witness testified that his home is in Tacoma. He was born in Minnesota. Had lived on the **[154]** West Coast thirteen years. He was not related to Mr. Bendixen in any manner. He is a brother-in-law of Peter Bendixen, uncle of Erwin Bendixen. He was at the home of Erwin Bendixen in Portland somewheres around the 10th of October. He was visiting there. He was at work here in the city and used to go up there and visit. He guessed Mrs. Bendixen was present when Mr. Bendixen made that statement. The three of them was about all, he guessed. He was there several hours. He just stopped in that day to call and had no other business that took him there. He saw Erwin Bendixen off and on. He had been on the road quite a while and witness had not seen him for a couple of months before that. He told Mr. Jacquelin and wife in Tacoma when he went home that he heard this statement. Mr. Jacquelin is a brother-in-law of witness and lives in Seattle. He is a stockholder in the company. Didn't think he told anybody else. First knew he was going to be brought

(Testimony of Wesley Nippolt.)

down here as a witness about a week ago last Saturday. He was subpoenaed and came here last Wednesday morning, when he went to the hotel. Did not go to Bendixen's. Has not been there this trip. He saw Mr. Bendixen here last Saturday morning outside of the courtroom and saw him this morning. He saw Mr. Albers and Mr. McGinn, his counsel, since he came down this trip before he saw Mr. Bendixen. He did not know what he was expected to testify and don't know now. He had no arrangement about the pay he should receive as a witness. He said he would pay his expenses, so he would not be anything out by waiting for the trial; Mr. Albers did. That would include such sums as he was earning. He was earning eight dollars a day. His expenses would be hardly five dollars a day. No, he had no agreement whatever, only defendant said he would [155] see witness would not lose anything because it was hard for him to get away from Cheney.

Testimony of Lot Q. Swetland, for Defendant.

Thereupon LOT Q. SWETLAND was called as a witness in behalf of defendant, and being first duly sworn, testified as follows:

His father's name was Edwin P. Swetland and was the founder of the Swetland candy establishment in this city, known as Swetland's. Witness is connected with the Perkins hotel and with the Swetland building on the opposite side of the street. He came to Portland in 1885. He was County Clerk from 1900 to 1902. Both he and his father were born

(Testimony of Lot Q. Swetland.)

in Springfield, Massachusetts. He does not belong to any German society, but belongs to the Sons of the American Revolution. He is an American on both his father's and mother's side, two hundred and fifty years back. They were New Englanders. He knows nothing but America. Has no traditions in the family except American traditions. He knows Henry Albers. Witness spends part of the winters in California. His wife is now there and he is simply here to attend this trial as a witness. He saw Henry Albers on or about the 7th of October, when he was crossing the ferry from San Francisco to Oakland to take the Oregon bound train. Thought defendant was perfectly sober then. Saw him after he got on the train in the observation-car. He was sober then. He was sober as late as witness saw him that night. The following afternoon when the witness next saw the defendant his condition had changed. He thought it was around about four o'clock he saw defendant. At that time he was intoxicated. So intoxicated that he could hardly recognize witness. Could barely recognize him. Witness attempted to talk to defendant at that time, and then withdrew, seeing defendant did not know who witness was. About an hour and a half [156] or two hours afterwards, in the washroom of the composite car, witness again saw defendant. At that time he should say defendant was drunk—intoxicated. Witness saw defendant again after he had dinner that night. Defendant's condition was the same as when witness had seen him before, or even

(Testimony of Lot Q. Swetland.)

more so. Witness did not know Mr. Albers very well, is not intimately acquainted with him and never had seen him when he was on one of his sprees. Witness saw defendant the following morning when he landed in Portland. Witness had heard about these remarks that defendant is said to have made. He did not hear any of them. He did not put defendant to bed that night.

On cross-examination the witness testified he had known Albers for several years past, just in a casual, passing way. He had not been intimately acquainted with him. They do not visit each other. Saw Albers on the ferry on the night that he crossed the ferry at San Francisco to go to the train, and saw him on the train that night. Did not observe anything wrong with him that night. Nothing of intoxication. Witness did not know defendant had the wherewith with him. He discovered that the next afternoon, about four o'clock, when he talked to defendant. He had a conversation with defendant that first evening, just before he retired, along about midnight, or a little before. Defendant did not produce a bottle and pass it around. Not in the presence of witness. Thought it was the next afternoon about four o'clock that he next saw Albers. He was sitting in his berth at that time. Witness did not know what time defendant got up, but thought he was intoxicated then. Yes, sir, he stopped and attempted to talk with him then. Defendant was asleep and *defendant* touched him on the shoulder. That wasn't the time defendant asked him to have a

(Testimony of Lot Q. Swetland.)

drink. Defendant just [157] kind of spoke in a maudlin way and witness left him. He next saw defendant about an hour and a half or two hours later, in the washroom, the smoking compartment of that car. Defendant was alone. That was the time defendant asked witness to have a drink. Later on witness saw defendant engaged in conversation in the washroom. Two or three hours after the first time witness saw him. That would make it after dinner-time. The train was about Ashland at the time. Witness ate at Ashland, at the station, where they had a twenty-minute stop. Some time after that he again noticed Mr. Albers in the washroom in conversation. When witness looked he just pulled the curtain aside and there were two or three gentlemen around defendant and all witness could see was just a little part of defendant's face and defendant did not recognize him and he withdrew. Witness just looked in because he knew defendant was there when witness was last there, and he looked in to see if defendant was in there and he was in conversation with two or three gentlemen at that time. Witness did not hear any of the conversation and did not stop. Yes, he later went into the observation portion of the composite car and had a talk with one of the gentlemen that had a conversation with defendant. Yes, he came back and looked into the washroom again and defendant was then alone, asleep. He imagined that was around nine o'clock, between nine and ten, he thought. Witness didn't wait up

(Testimony of Sergt. Felix H. Simons.)

any longer, but went to bed about ten o'clock, he thought. The next morning he saw Mr. Albers just for a moment, when he got off the train.

Testimony of Sergt. Felix H. Simons, for Defendant.

Thereupon Sergt. FELIX H. SIMONS was called as a witness in behalf of the defendant, and being first duly [158] sworn testified as follows:

That he lives in Multnomah County. Was born in San Francisco, California. His people were born in Germany. He knows Henry Albers; has known him since September, 1914. For about two years he was Mr. Albers' private secretary, commencing about the early part of 1917. Both before and after America went into the war. He knows Mr. Albers very well. About 102 boys, as far as he knew, went out of the Albers Milling Company's establishment to the war. They have two gold stars. Two boys have been killed in the service. At the time the draft came along he was somewhat worried about it because he didn't care for—never did care for military life, so he consulted Mr. Albers on several occasions and Mr. Albers told him not to worry about it. He says go into it, join the army, as he said it. And it would make a better man out of witness, both mentally and physically, and that it would soon be over and it made no difference when he came back, he could always come back to the firm. And if there was no opening he said they would make a place for witness. Yes, on several occasions defendant has spoken to some of the boys. He remembered one, the order

(Testimony of Sergt. Felix H. Simons.)

clerk, who was claiming exemption on account of his mother, and defendant told him that he ought to join, it would make a better man out of him. He told him this notwithstanding the fact that he was obligated to support his mother, yes, sir. Witness did not, from his intimate relations with Henry Albers as private secretary before America went into the war and after America went into the war, ever know defendant to utter any things against the Government of the United States. Defendant's utterances against the United States Government had been absolutely none. They had [159] been for the Government. Witness is 24 years old. When witness went into the service defendant told him while he was gone, if there was anything he could do for witness, financially or otherwise, to take care of financial affairs, he would take care of them. Just let him know, and he would take care of them. In other words, he promised to look after witness' family during the time he was in the service of the Government of the United States, if necessary.

On cross-examination the witness testified that he enlisted July 23, 1918, at Hillsboro. That was his Local Board. He was 25 August 15th, and he had worked for Mr. Albers since 1914. He is not married. He had a discussion with Mr. Albers about the Draft Act. He didn't recall just what time it was, but it was about the time the Draft Act was passed, yes, sir. Witness was discussing with defendant the status of witness in the draft. Witness knew he would be in the draft. And defendant

(Testimony of Sergt. Felix H. Simons.)

advised him if he was called to go, and he did go when his call came. Yes, he had heard Mr. Albers express pro-German feeling before we entered the war. He could not say that defendant was quite pronounced in his views as to the military situation abroad. He could not say so. Oh, defendant was for the Germans, naturally. He was very outspoken in that particular. Witness didn't know that he was so outspoken all the time. He could not say when defendant started this. No, sir, witness was not working for him on the 31st of July, 1914. Went to work September 17, 1914. He didn't recall that defendant was pronouncedly pro-German when witness went to work for him in September, 1914, because he didn't have much to do with Mr. Albers at that time. He had done work for him in the first part of 1915, and then [160] off and on. He could not recall that defendant was pronouncedly pro-German then. At a later date he became somewhat pronouncedly pro-German. When it did occur is more than he could tell, but it had ceased absolutely by the first of April, 1917. When we were about to enter the war he never heard Mr. Albers make any remarks on the war subject on either side. He hadn't ever heard Mr. Albers discuss the advisability of this country entering the war at all. Never heard any discussion of that kind, no, sir. Well, before we entered the war, yes, he had heard Mr. Albers make pro-German utterances relative to the Allies, the English and the Germans. He never heard him discuss the matter of the "Lusitania," no,

(Testimony of Sergt. Felix H. Simons.)

sir. He didn't recall that. He didn't remember exactly having heard any discussion from Mr. Albers in the matter of the alleged atrocities in Belgium and Northern France. And had not heard him express an opinion as to the outcome of the war. He could not say that Mr. Albers talked very much when he was about. About all he recalled was that he went to ask Mr. Albers about going into the draft and later told him if he were called to go.

On redirect examination the witness stated that the defendant told him, as he said, to join the army, before he was drafted. Yes, must have been six months before. And not to worry about his mother, or any of his people. That if defendant got word that he would look after her.

On recross-examination the witness testified he was still in the service, stationed at Camp Lewis. Had been over there the last six months. Had not been stationed at other points prior to going to Camp Lewis. Had been there all the time. [161]

Testimony of Dr. Ernest A. Sommer, for Defendant.

Thereupon Dr. ERNEST A. SOMMER was called as a witness in behalf of the defendant, and being first duly sworn testified as follows:

That he came here in the summer of 1886, is a physician and surgeon. Graduated from the Medical Department of the Willamette University, Portland, in 1890. Studied in Johns Hopkins, also in New York, and he had studied abroad. He studied

(Testimony of Dr. Ernest A. Sommer.)

three years in Germany. Had studied in France and studied in England. He is a school director here and has been in the army six months. He was captain. He knows Henry Albers, yes, sir; quite a while. Thought he met Mr. Albers the first time in January or February, 1893, or possibly 1894. Could not exactly say the year. The first time he met defendant the latter was employed, he thought, by the McKay Estate on the corner of Third and Stark Streets. Defendant was taking care—machinist for the McKay Building at that time. Defendant at that time, if witness remembered correctly, was suffering from rheumatism, or something of this kind, and witness was called in to see him. Yes, he knows about defendant's drinking habits. Witness had been sent for a number of times when defendant has been on a spree. He had been asked to take care of defendant and look after him during those times and had done it. Witness thought he was the only physician that defendant applied to during these years, unless there was some special line of work for which he consulted other physicians. The number of times that he had taken care of defendant when he was in this condition witness could not say, but knew it must have been a number of times. He should say defendant was a periodical drinker of the worst type. These men (periodical drinkers) will drink, and drink to excess, and drink to such a point that they [162] absolutely lose all ideas of social conditions, rules, regulations and things of that kind. Then they sober up and go along for long periods of time

(Testimony of Dr. Ernest A. Sommer.)
without taking any drink of any kind, and then go off on another. No, witness thought that they do not to a certain extent have any idea as to when these spells will come on. He thought they go along and try to keep from drinking for a long time, until this desire to drink comes over them, and after they have started, why, they cannot stop it. He thought it is firmly a diseased condition. He would say defendant, when he is drinking, was, putting it plainly, a damn fool. He had tried to reason with him when he was in this condition and could not reason with him in any way, shape or manner, and he had talked to him after he was sobered up and defendant did not know what he was trying to do for him. He is just a perfectly helpless wreck when he is in his cups, and when he is otherwise witness thinks he is one of the most mildest mannered men, a man that would not harm any person at all. He is a man charitably inclined, a man of good behavior when he is not drinking. His general conduct, aside from his cups, is that of an exemplary citizen. He had never heard him say anything derogatory of the Government of the United States of America. He did not know when defendant was made a citizen of the United States, but he knew that the older brother came to Portland first, and later on witness became acquainted with *he* and he thought it was some time in the fall of 1893, he would not be positive, but witness was surgeon on a trans-Atlantic steamship line running out of New York to the continent, and they were returning from New York into Holland, Rotterdam, when witness brought his other

(Testimony of Dr. Ernest A. Sommer.)

brother William Albers, Frank Albers and his sister [163] across from Germany. They embarked from Rotterdam, Holland, on the Holland steamship line at that time. The sister was alone with these two boys. Witness did not know when George came across. He knew that—as the story goes—the father was in the milling business in the old country. Their mother died and after these boys were established here and had a home of their own they sent for their father and brought their father to this country, and their father died in this country. Witness had never heard defendant say one word derogatory of the Government of the United States.

On cross-examination the witness testified that he was no relation to Henry Albers. The older brother, Ben Albers, married witness' sister. Ben was his brother-in-law, yes. He had been very well acquainted with the Albers family, the entire family, yes, sir. No, he knew nothing about Henry's condition on the 8th of October, 1918. The last time he saw him was some time—personally—was here in—he thought it was the first part of July when witness left Portland and went into the army, the last time he saw defendant. He had never heard Henry express any pro-German views, never. No, sir. He didn't think they had any particular conversation on that line at all before America entered the war. Defendant was down in Oakland a good deal of the time when they were building the mill, backwards and forward. He never discussed the war with witness at all, no, sir. He hadn't talked to Henry since July,

(Testimony of Dr. Ernest A. Sommer.)
when witness left for the army. Had not seen Henry since that time to talk to him. He met Judge McGinn yesterday or the day before, in front of the Oregonian Building. He met Mr. Citron, he thought, about the time they brought the subpoena up, about a week ago, practically. He didn't decide [164] to become a witness when he was subpoenaed. He didn't decide it, he concluded he would come up here because he was subpoenaed. He didn't want to be a witness.

On redirect examination witness testified that his sister is dead. The children of Ben Albers, the oldest brother, are witness' nieces. Three of them. Ben afterwards married again, married Ida Wascher, and they have four children there. Four with Ida Wascher and three with witness' sister.

Testimony of Conrad Lehl, for Defendant.

Thereupon CONRAD LEHL was called as a witness in behalf of the defendant, and, being first duly sworn, testified as follows:

He was born in Russia. He was seven years old when he came to the United States. He entered the service of Albers Brothers about six and a half years ago. About August, 1913. About a year before the war. He has known Mr. Albers ever since he has been employed there. When the United States declared war, and just before the boys—just before they wanted to draft the men, why, they all wanted to go into the war, so Mr. Albers—before this he said to the boys that it would be a great experience for them and

(Testimony of Conrad Lehl.)

that it would make men out of them. He didn't say this just exactly in the presence of all of the employees, but witness was there and a few of the other boys, but witness could not tell who they were. Witness remembered Robert McMurray. He didn't know whether it is the son of the Superintendent of Traffic on the Oregon Railway and Navigation Company, or not, but he knew Robert McMurray, or Second Lieutenant McMurray. He was there at the time the boys were there. They always used to get together in the office and talk about those things and Henry came along and he encouraged the boys, that is all. He encouraged the boys to go to war and to fight for the Government of the United [165] States and against the Imperial Government of Germany, yes, always. No, sir, he never heard defendant say a thing against the Government of the United States. Defendant was always up for America since when the United States entered into the war. Ever after the United States entered in the war, strongly for the United States, yes, sir. No, sir, there was no fifty-fifty there, not that he had ever been in defendant's presence at the time he was speaking. Witness is not now in the service. His service ceased December 17, 1918. He is working at Albers now. Yes, sir; his place was open when he left for the army, open until he came back and when he came back he found it there, yes, sir. The other boys, every one that has come back so far has come there that he knows of. One hundred boys went out of the Albers Milling Company to the service of the Government of

(Testimony of Conrad Lehl.)

the United States and against the military German Empire. He didn't know how many went from Portland and didn't know how many were volunteers.

On cross-examination the witness testified he was nineteen years old. He was in the service two months. He left for Corvallis September 20, but he wasn't inducted until the 15th of October, 1918. He enlisted at Corvallis, S. A. T. C. He had registered in the draft before he enlisted. He was at Corvallis about two months in the Student Army Training Camp, and had been out of the service since December 17. He stayed at Corvallis helping a lieutenant on the 17th and on the 18th he came back, and he thought on the 19th he went to work for Albers and has been working there steadily ever since he went with Albers Brothers except these two months. He works there in his uniform since he came back. [166] Albers Brothers do not require it. He does that himself. He is assistant cost accountant. He works on the books. Well, he didn't know whether it is books, all kinds of red tape, that is all, no books to it. No, sir, he does not make out invoices or things of that kind. Just finds the cost, you know what that is, cost of material, etc. He had never heard Mr. Albers say anything concerning the war or against the Government of the United States since we entered the war. He had not heard him say anything against the United States at any time, but he was strongly for Germany before America declared a state of war. He did not know whether defendant believed the German cause would triumph or was in favor of it. He

(Testimony of Conrad Lehl.)

could not just exactly express his opinion about it. He did not know whether defendant hoped the German cause would lose. He never said anything about that. Witness was not able to find out. Between 1913, when witness went to work at Albers', and the time the United States went into this war on the 6th of April, 1917, he had not heard Mr. Albers express any views as to the outcome of the war. No, sir, he had not heard Mr. Albers discuss the "Lusitania," and had not heard him discuss the alleged atrocities or cruelties said to have been practiced by the German armies in Belguim and Northern France. Had not heard him discuss the sinking of the "Sussex" or the "Gullflight." He never heard Mr. Albers talk much about the war at all.

Testimony of Richard K. Clark, for Defendant.

Thereupon RICHARD K. CLARK was called as witness in behalf of the defendant, and being first duly sworn testified as follows:

That he worked for the Pullman Company as porter. Had been in the employ of the Pullman Company as a porter nearly thirteen years. He does not know Henry Albers [167] personally. Sees him sitting over there by the side there. He recognizes him, yes, sir. He saw Henry Albers at the Oakland pier about ten P. M. on the 7th of October, 1918. In his opinion defendant was about half drunk. About 11:30 defendant went to bed and he didn't see anything more of him until the next morning. When he went to bed he was pretty—about half drunk. He

(Testimony of Richard K. Clark.)

went to bed alone that night. Defendant got up about ten o'clock the next morning, he thought, about ten. From then on he was continually drinking whiskey. Whiskey that he had with him. He had a quart, anyway, that witness knew of. And he could not say positively whether he had any more than that. He saw those fellows get around him after they left Grants Pass, about 7:30 or 8:00 o'clock, somewhere around there, the night of October 8, 1918. Gaumaunt or Tichenor. Mr. Tichenor—Gaumaunt was the moving spirit in surrounding Henry Albers at that time. Gaumaunt was the leading one of the two. Mr. Albers had been drinking pretty heavy all day and that evening, after these men surrounded him, witness knew the condition defendant was in and he wanted to get his whiskey away from him, and so about 9:00 o'clock he went to try to get Mr. Albers to go to bed, and he took his grip from the washroom to his berth and after he had done this this man Gaumaunt came and said he wanted that grip. He said, "I want that grip." He says, "There is something in it I want to get out of it." Witness said, "What do you want with it?" He says, "Something in it I want to get out, something in there I want." And witness said, "What authority have you to want this man's grip?" he says, "Well, I am an officer." Witness said, "Well, you will have to show me if you are an officer," so in the meantime the Pullman conductor [168] came along and witness says to the conductor, "How about this man? He claims he is an officer and wants this man's grip. What shall I

(Testimony of Richard K. Clark.)

do about it?" The conductor said, "Well, let him have the grip." In the meantime Gaumaunt showed witness some kind of a little badge. Witness didn't know what it said on it. Gaumaunt said that was his authority, he was an officer. He showed witness some kind of a badge. Gaumaunt didn't say anything at that time excepting that he wanted the grip, there was something in it. Later he said the only way to get a German to talk was to get him full; get him full of whiskey. Witness thought that was all that he heard at that time. This was at Roseburg he was telling witness this. Witness didn't hear any conversation that was going on. He did not hear a disloyal sentiment uttered by Henry Albers from the time that he took the train at Oakland until he got to Portland. In the daytime he was in that washroom on the observation-car from every ten to fifteen minutes. This was an observation sleeper, and defendant was sleeping in the observation-car. The observation is in the rear end of the sleeping-car section. When defendant went to bed he was stupified from drink. Witness put him to bed. After he got him down to the berth the brakeman helped him. Defendant wasn't able to take his clothes off when he put him to bed that night. He slept in his clothes, to the knowledge of witness, as far as he knows. He wasn't able to take his shoes off. Slept in his shoes. Witness saw Mr. Tichenor making notes after he put defendant to bed and after they had taken his grip back. He saw Tichenor making notes when he went and put defendant to bed finally—the last time. He

(Testimony of Richard K. Clark.)
was making notes then, yes, sir, [169] writing it down. There was two or three of them with him. This man Mead and Gaumaunt and Mr. Kinney. Witness thought there was another man, three or four of them. Mr. Tichenor was writing it down and they were all around him. Witness thought they were giving the information and the writing was done by Mr. Tichenor. When these conversations were going on Tichenor was in a little hall right by the smoking-room, listening. He was listening and peeping. Peeping and listening, yes, sir.

On cross-examination the witness testified that he didn't hear any disloyal statements and did not hear any loyal statements made by Mr. Albers. He didn't hear either way. He had been introduced to Mr. Tichenor. He saw him about a year ago the first time. Saw him in Roseburg one morning. Yes, he knew who Mr. Tichenor was. Knew he was a United States Marshal. Knew his name to be Tichenor, didn't know his first name. He got on at either Medford or Grants Pass, witness could not say which of the two places. Knew he was a Government official, yes, sir. Witness didn't know Mr. Mead except that he was pointed out to him. The brakeman pointed him out. Told him that was Mr. Mead; to-day. Pointed him out to witness outside there in the hall. Witness didn't know the brakeman's name. Thought he was a witness for the defense. This Mr. Mead happened to go by and the brakeman says, "There is Mr. Mead." That was the first time witness saw Mr. Mead since October 8, and he recalled that was the

(Testimony of Richard K. Clark.)

gentleman whom he saw on the train. Witness knew what section Mr. Mead had, yes, sir. Mr. Gaumaunt got on at 16th Street, Oakland. He was positive of that. He remembered that he got on. Remembered him when he got on at 16th Street. [170] Witness saw him get on. Witness first learned his name was Gaumaunt when he went up to Mr. McGinn's office. He went up to Mr. McGinn's office a little after this incident occurred on the train, about a couple of weeks later. Mr. McGinn sent for him; and he thought Mr. Citron told him the name of Mr. Gaumaunt. Yes, sir, McGinn was present also. Mr. McGinn was right sitting beside. They didn't show him a picture of Gaumaunt. Witness described one of the men to Mr. Citron and he told witness that that was Gaumaunt. That is how he happened to know him by that name. He saw him out in the hallway about the courtroom, he believed. He knows the difference between Mr. Gaumaunt and Mr. Kinney. He could not state positive when he knew the name of Mr. Kinney as being one of the passengers on that train. He wasn't sure who told him. He wasn't positive whether Mr. McGinn did; somebody told him. He had never seen Mr. Kinney from that day until to-day. He found that out—where these other passengers belonged. He sizes up his passengers pretty good when they get on. He sized Mr. Albers up too. He noticed Mr. Albers was full; that was the reason he sized him up. Mr. Albers was full when he got on the train at Oakland. He didn't size up a gentleman by the name of Mr. Swetland. He does

(Testimony of Richard K. Clark.)

size up all his passengers, but don't take particular notice of all of them. He took particular notice of Mr. Albers because he was drunk. He noticed Mr. Gaumaunt; he was the only one that got on his car at 16th Street, that is the reason he noticed him. Mr. Albers was about half drunk, yes. He had lots of whiskey in him. His condition was noticeable. He had lots of whiskey in him. He had some in his grip. He first learned that next day, after they got up on the [171] road somewheres. To the best of his recollection defendant got up about ten o'clock. He didn't think he saw Mr. Albers sitting and talking with anyone that night after he got on the train on the 7th. Didn't remember seeing him talk with a gentleman who was Mr. Swetland. They don't have so much time to size the passengers up that first night, because, you see, they go to bed early. They go to bed. He didn't pay much attention to Mr. Kinney that night. Mr. Gaumaunt, he didn't pay so much attention to him except he knew he got on at 16th Street. His attention was next called to Mr. Albers after he got up. About ten o'clock in the morning. He went in the washroom. Then he was drinking whiskey in the presence of witness. It was in California in the morning. It is up to the conductor—it is not up to him to permit drinking. He is only the porter. Defendant took the bottle out of his grip, yes, sir. He did that in the washroom. Witness went in there for the purpose of cleaning the car, cleaning that room. Defendant wasn't in such bad condition when he first got up. Witness was able to talk with him.

(Testimony of Richard K. Clark.)

He did not tell witness his name was Mr. Albers. Witness first found out after he had this trouble with Gaumaunt, when Gaumaunt wanted to take his grip back to the washroom. At that time witness was making his berths up. He begins anywhere from about seven to seven-thirty. It usually takes about a couple of hours to make up all the berths. And during that time was when the conversation took place in the washroom. Witness was busy engaged all that time in making up his berths. He didn't hear any conversation. He had occasion to go by and he saw these men in the washroom. He didn't know what they were there for. Yes, most of this took place during the time [172] he was making up his berths. The train got into Roseburg about 11:30 that night. Somewheres around there—11:20. He believed they were about twenty minutes late. They were a little late anyway.

In redirect examination the witness testified he found a detective card, the Field (?) Detective Agency, in Lower 1 occupied by Mr. Mead, he thought.

On recross-examination the witness testified that occurred coming into Portland. He found it in his berth. Nobody else in his berth. He didn't know if Mr. Mead is connected with the Field Detective Agency or not. He first told that story to Mr. McGinn. He told him to-day, for once. Told him this morning, or this afternoon. He didn't know where the card is. He gave Mr. Mead the card back; yes, sir.

Testimony of George Lawrence, for Defendant.

Thereupon GEORGE LAWRENCE was called as a witness in behalf of the defendant, and, being first duly sworn, testified as follows:

That he lives in Portland, Oregon. Has lived here about ten years. Lately he came from Louisiana, from Camp Beauregarde. He knows Mr. Henry Albers, the defendant in this case. Has known him about four years. Prior to entering the service of the Government of the United States he was traveling for Albers Brothers Milling Company as traveling salesman. He was accepted for enlistment in the service of the Government of the United States in May, 1917. About a month and some few days after we entered the war. He volunteered. He did not have any conversation with Mr. Albers before he went into the service. He had a conversation with Mr. Albers after he entered the service. He was up at the office and he met Mr. Albers, shook hands with him, and Mr. Albers says—they talked general things a few [173] minutes—"Well," he says, "it is a fine thing for a young man to be in the army, a fine thing." He did not say anything else. Defendant said, with reference to his place there in the company, that witness could come back—his job would be open. He is going back to it the first of the month. Returned here Saturday—last Saturday, and the first of February his job is open to him. His rank is First Lieutenant. He did not, in all the time that he was in the employment of that company, hear Henry Albers say one word against the Govern-

(Testimony of George Lawrence.)
ment of the United States of America or against the army of the United States, or the Navy of the United States of America.

On cross-examination the witness testified that he went to Training School a very short while at Camp Johnston, Florida. That was after he went into the service. He first went, after leaving Portland, to Vancouver Barracks, then Camp Johnston, Florida. He went to the Training School about eight or nine months after entering the service. He was at Vancouver some length of time. He enlisted in the Medical Department. He had no conversation with Mr. Albers prior to entering the service about the war in any shape. About all he said to witness was that the army was a fine thing for a young man, yes, sir. He seemed to be very much in favor of it. Prior to that time witness had never heard him discuss the war situation at all, and had not heard him discuss it any since that time. Witness left shortly after that and he had been in camp.

Testimony of George A. Westgate, for Defendant.

Thereupon GEORGE A. WESTGATE was called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

That he is not of German [174] ancestry. His ancestry on his father's side is American for two hundred and fifty years or so. His mother was Scotch and was born in Canada, and witness was born in the United States. He has been connected with the grain trade most of his mature life. He knows

(Testimony of George A. Westgate.)

Henry Albers, the defendant in this case. He is acquainted with Albers Brothers Company. He was appointed Surveyor-general of this State by President Roosevelt and served partly under President Taft. He has been in the service of Albers Brothers about five years. He is assistant manager. No man in the service of the Albers Brothers Milling Company has more complete access to all of its documents than has witness. The secretary, of course, keeps the papers, but he thought it fair to say that he has access to every department of their business, every department of that establishment. He thought he knew that business pretty well. He had the responsibility in the line of grain more particularly; he handles that almost exclusively. He never heard Mr. Albers make a disloyal statement against the Government of the United States. Witness knew what defendant's attitude was with reference to the military and naval departments of the United States, and defendant's attitude was in support of the Government and in sympathy with it. He should say defendant was more pro-American than he was anti-German. They (Albers Brothers Milling Company) have somewhat over one hundred enlistments in the service of the United States Government. He could not give the exact number, but it was over one hundred. That was from the system there, all the mills. He could not give the exact number from here. It was about in the general ratio, possibly between thirty and forty. [175]

(Testimony of George A. Westgate.)

On cross-examination the witness testified that he thought there were altogether in the system about between nine hundred and one thousand employees, and when witness said enlistments he meant to include voluntary enlistments and all others who entered the military service. He could only judge in the line that he is interested and he thought that they had just a little the best of other houses in their line in respect of the percentage of men enlisted, including those who were called by the draft. The boys went in the beginning, the cream of them enlisted voluntarily. In his own particular department the cream of the boys enlisted voluntarily before the draft.

Testimony of Jacob Speier, for Defendant.

Thereupon JACOB SPEIER, was called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

He had been in the military service of the United States about three months. He is not in that service now. His service to the Government of the United States ended about the 13th of December, 1918. He knows Henry Albers, the defendant in this case. Could not say the exact time he had known him, probably ten years. He could not *da*y what the attitude of Mr. Albers was towards the Government of the United States and the Imperial Government of Germany since America entered into the war in April, 1917. He really could not say that he knew of any particular instance in that time in which he could state that Mr. Albers' conduct became known to him.

(Testimony of Jacob Speier.)

Mr. Albers offered him his dock down there. He asked Mr. Albers if they could put some of their ships at the dock and he said, yes. He could not recall what else Mr. Albers said. He told him they could have the dock. [176]

Testimony of Bert M. Denison, for Defendant.

Thereupon BERT M. DENISON was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

That he knew something about the assets of the Albers Brothers Company. Means of learning their value arose out of his intimate connections secured by being at the meetings of the Board of Directors, being auditor of the company, and having charge of their bookkeeping records and everything of that nature, for about twelve years. He has been with them for twelve years and is still with them. Knows them all intimately and well. Knows Henry Albers very well. Yes, sir, he thought he knew what Henry Albers' attitude toward the Government of the United States has been since America entered the war in 1917. His attitude has always been that the United States should win, the United States and its Allies. He thought defendant's net worth is about $250,000.00. Knowing all that he does about defendant's personal affairs and his own liabilities and his own assets, witness considers that is all defendant to be worth. There is no one that has as intimate a knowledge of that concern as witness has, not among the directors or stockholders or employees,

(Testimony of Bert M. Denison.)

no, sir. He doubted whether any of the employers had as much knowledge about the inside workings of the business as he had, take it altogether. Albers Brothers Milling Company since the Government of the United States entered this war has subscribed $300,000.00 in Liberty Bonds. The company when Mr. Albers was president. They have purchased $300,000.00 in Liberty Bonds and they still own those bonds, all but $25,000.00, he believed. The $25,000.00 they sold to the employees at seventy-five cents on the dollar, to encourage the employees to buy them. That was on the first issue. [177] They paid one hundred cents on the dollar and gave it to their employees at seventy-five cents on the dollar, yes, sir. The net loss to the company was one-fourth of $25,000.00. He had a memorandum from which he could state at this time just what was done by the Albers Milling Company towards the war, towards Liberty Bonds and towards contributions to the various charities connected with the war. He had the list from their own office, and the list that was furnished to their office as the head office. The list that comes from the different branches. He had it in his pocket. Albers Milling Company is an Oregon corporation. It has branches in Bellingham, Seattle, Tacoma, San Francisco, Oakland, Los Angeles and Ogden. The concern subscribed the following towards the war: The First Liberty Loan was $25,000.00, Second Liberty Loan $50,000; Third Liberty Loan $100,000; Fourth Liberty Loan $125,000; total of $300,000. To the Red Cross drives, $8,724.

(Testimony of Bert M. Denison.)

To the Y. M. C. A. $2,255. To the Knights of Columbus, $825.00 To the United War Work Campaign, $10,155. Then there were sundry subscriptions in amounts from $100 to $300 that covered such things as buying a motorcycle for the Oregon Machine Gun Company, for the Salvation Army funds, Armenian funds, Boy Scout funds, Soldiers' Christmas funds, Multnomah Band, advertising for drives, Base Relief Hospital, Minute Men, Canteens, Food Administration, American Protective League Society, for the Secret Service Division, Y. W. C. A., Pacific Aero Club, Camp Freemont, National Defense League, Council of Defense, Belgian Relief Ship, and probably three or four hundred others. The aggregate of these sundry items was $10,373.50, making a total of $32,332.50 given away. **[178]** This was done by the concern during the time that Mr. Henry Albers was the president of it. Mr. Albers' attitude toward the boy that went to the front in the war was always very favorable, speaking to the boys about going, encouraging them to go and promising them their positions when they came back, and his promises have been redeemed and are to be redeemed. No man that ever went to the front will come back without having his job there for him. No, sir, what has been said about these people selling their Liberty Bonds is not a fact. There has never been anything in what has been said about their not hanging up the American flag. It was untrue, always. Witness had heard the report about ground glass that was put into their flour. Had no foundation whatever, of

(Testimony of Bert M. Denison.)

course; absolutely untrue, yes, sir. Witness as a matter of fact had been humiliated time and again by reports that were put out against the Albers Brothers and their loyalty, that were unfounded. Witness knew all Mr. Henry Albers' expenditures. He did not think that there is a dollar that Henry Albers spends that he did not know pretty nearly where it goes. Defendant keeps his accounts in the old-fashioned way, has the old-fashioned way of keeping them on the firm book and every dollar that he gets has to go through their rather elaborate voucher system. It passes through the hands of three or four men, and each voucher must have a paper attached vouching for the item. He never knew of Henry Albers contributing one dollar to any government in the world outside of the Government of the United States. The Government, of course, had access to their books at all times. The statement of their business is audited periodically and the Food Administration statements, which were very numerous, include [179] Inventory Statements, Profit & Loss Statements, and everything of the details about their business.

On cross-examination the witness testified: He had been connected with the Albers Brothers concern twelve years, a little over twelve years. He is Secretary of the corporation. Mr. Albers' attitude since the war, that is, since the entrance of the United States into the war, has been to the effect that he was anxious that the United States and its Allies should win. Defendant's expressions were mostly

(Testimony of Bert M. Denison.)

in meetings of directors in which they were passing on Liberty loans or other questions about the Government, in which he was strongly in favor of supporting the Government in all ways. Defendant didn't directly express the wish that the United States and its Allies would win, only in these directors' meetings. Never heard defendant make that remark in those words, no, sir. Before the United States entered the war defendant was not decidedly pro-German in his views in the office or around the business. Not to the knowledge of witness. Not to him, anyway. He didn't know then that the reports that came in through these things that Judge McGinn mentions, about glass and oats and flag and all that sort of thing, came from Henry Albers in any way. The statement that Henry Albers, the defendant in this case, was decidedly pro-German prior to the time the United States entered the war has no basis in fact, so far as witness knows. The corporation contributed three hundred thousand dollars to Liberty Bonds and thirty-two thousand some odd—well, roughly, it is three hundred thirty-five thousand contributed to various sorts of activities. As a business proposition witness considers the bonds a good investment. Albers [180] Brothers Milling Company is controlled by a Board of Directors. The Albers Brothers, Henry Albers and his brothers, control the majority of the stock. No, they do not own practically all the stock. There is about twenty per cent owned by other people. He thought Henry was the Chief owner among the

(Testimony of Bert M. Denison.)

brothers. Henry had 1568 shares of stock against 1533, something like that, owned by Will. There has been no change in the ownership within the last six months or a year, no, sir.

Upon examination by the Court the witness testified that the capitalization of the firm was one million dollars common stock and a million preferred stock.

On further cross-examination the witness testified the capital is not all taken. Three-fifths of it is taken, the rest of it is treasury stock. No, they do not declare dividends with their profits, they leave all their money in the business. They declare only such dividends as they need. Leave the major part of their money in the business. Roughly the accumulated profits amount to about two million dollars.

Testimony of Leo Davidson Cook, for Defendant.

Thereupon LEO DAVIDSON COOK was called as a witness in behalf of the defendant, and, being first duly sworn, testified as follows:

He lives in Portland. Has lived here about three years and three months. He is sales manager of the Albers Brothers Milling Company. Has occupied that position a little over three years. He is acquainted with Mr. Henry Albers, the defendant in this case. He never heard defendant make any statements pro or con to the employees or any employee of the Albers Brothers Milling Company with reference to service in the army and navy of the United States of America [181] during the war, the present war with the Imperial German Empire.

(Testimony of Leo Davidson Cook.)

But P. S. Brown, who had been witness' assistant, was in his office at one time prior, as he recalled, to the conscription act going into effect, and Mr. Brown was discussing with witness whether he should enlist or make a trial for the training camp. At that time Mr. Henry Albers walked into the office and made the remark that it was a good thing, that when the young man goes into the army, when he comes out it has made a man of him. That is the only remark he ever heard defendant make regarding the war. He did not say anything with reference to the position of the man being ready for him when he returned from the war. Mr. Brown is a First Lieutenant at Camp Lee, Virginia. He enlisted somewhere around between May or June, 1917.

Testimony of G. W. Harvey, for Defendant.

Thereupon G. W. HARVEY was called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

He is office manager for Albers Brothers Milling Company and knows Albers Brothers' staff from top to bottom. Without exception they are all Americans. He was speaking of the office. He knew this company during the entire time that Mr. Albers was its president. Mr. Albers was glad that the employees of the corporation were going into the war. There was one time he was in Mr. William Albers' office and they were discussing about the boys going, there were three of them went at one time, and Mr. Henry Albers in the course of the con-

(Testimony of G. W. Harvey.)

versation says: "Well, it is a fine thing; it will make men of the boys." And he encouraged them to go into the service of the Government during the war. This was some time during the month of May, 1917, just a little time after we entered the war. Witness did not know whether the [182] conscription act had been passed at that time or not.

Testimony of G. F. White, for Defendant.

Thereupon G. F. WHITE was called as a witness in behalf of defendant, and being first duly sworn, testified as follows:

He is cashier for Albers Brothers. Has been in their employment constantly a little over twenty-one years. He knows Henry Albers and knows the office force of the Albers Brothers Milling Company. It is pretty nearly mostly all American. He had seen nothing in Mr. Albers' attitude towards the war since the United States entered it but loyalty towards America. Nothing has gone on in the office in any way during that time that he has been connected with it on the part of Mr. Henry Albers to show that he was anything but a loyal American citizen. Witness is the oldest employee in the office. Witness had a nephew that went out of the establishment to the war. His name was McDaniels, and he was killed. They have a gold star down there in commemoration of his nephew giving his life to the American cause in this war. He didn't know that Henry Albers did anything for that nephew, only said he was very sorry that he should be killed.

(Testimony of G. F. White.)

Seemed to be affected very much, yes, sir. Witness has a son in the army. He is not an employee of the establishment. Witness kept Henry Albers' personal accounts. He never knew of Henry Albers contributing one cent towards the Imperial German Government or anyone representing or connected with it, and he knows defendant's accounts from top to bottom.

Testimony of John Murphy, for Defendant.

Thereupon JOHN MURPHY was called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

He knows Henry Albers. Witness is a longshoreman. Has worked upon the beach (dock) about seventeen years. Yes, he knew Mr. Henry Albers stated on one occasion to witness **[183]** and others that this was the best country in the world—more opportunities for a working man. He could not recollect just exactly what the others were. It was pertaining to the elevation and praise of this country, generally. He had never spoken to defendant about Bolshevicism, but he had seen how detrimental defendant's system is to Bolshevism. It is on that he and others have commented. He guessed witness' people will try to save this country against Bolshevism. There isn't any Bolshevism in witness. Bolshevism—he never mentioned that word to Mr. Albers, but the way defendant conducts his dock has left it powerless—there is no incentive to Bolshevikism. He runs his dock and he treats his men and

(Testimony of John Murphy.)

treats the longshoremen that aren't his men, that comes there to work, in such a manner as to make them satisfied with the conditions. He could give many instances if he wished and so could the other men that work there. He had never heard Henry Albers say a word against the American form of Government.

On cross-examination the witness testified he could not state the exact time when this conversation occurred in which Mr. Albers told him that the American Government was the best Government in the world and furnished the most opportunities of any Government. It is on various occasions he speaks—he comes around on the dock and as witness is working there he will come up and speak to him. He invariably speaks to him every time he goes on that dock. The last time he was speaking to Mr. Albers he thought it was on Third Street just before this country went into the war, and then while he seemed to sympathize with Germany, the remark came up, the witness thought it was broached by himself, "If this country," witness said, "If Uncle Sam takes a hand in it, it will be all off with [184] Germany." Defendant said: "Yes," "It is impossible—the resources of this country is too great. She would crush Germany," words to that effect. Witness could not give the exact words now that defendant made use of. But it left the impression on him, an impression that was already in his mind, that this country could not be beat by the world. The whole of Europe would not beat this country, to

(Testimony of John Murphy.)

witness' mind. That was prior to this country going into the war. Witness is that strong pro-American that he believed there is nothing in this world can beat this country. He didn't know whether defendant knew his views. He didn't think they ever spoke upon the subject prior to witness overtaking defendant on Third Street. He was walking along. They had been always talking upon America. Witness might say that any time defendant has been commenting upon the war, upon the system in this country and others, that is what witness drew from him—that this country—a man had the best opportunities in this country. It is generally known what witness thinks of it. He guessed everybody that knows him knows where he stands.

Testimony of John L. Ryan, for Defendant.

Thereupon JOHN L. RYAN was called as a witness in behalf of the defendant, and being first duly sworn testified:

He had known Henry Albers about fourteen years. He is the Grand Clerk of the Neighbors of Woodcraft, a fraternal organization, and secretary of the Rotary Club. He had had occasion several times during the fourteen years that he had known Mr. Henry Albers to observe him when he is on his periodic sprees. Altogether he would think probably half a dozen times. His opinion is that defendant does not know what he is doing when he is intoxicated. He had had occasion to see him after he was over them, to determine or ascertain [185] whether

(Testimony of John L. Ryan.)

or not the defendant knew what had happened while he was in that condition. Defendant absolutely knew nothing of what had transpired while he was drinking. Henry Albers sober was a very fine man; drunk he is a beast. Violent in his language and action, yes, sir.

Testimony of J. P. O'Neill, for Defendant.

Thereupon J. P. O'NEILL was called as a witness in behalf of defendant, and being first duly sworn, testified as follows:

He was born in Portland. His age is forty-two. He is a single man. He knows Henry Albers. He is interested with him in the schooner "Oakland." Has been so interested in the schooner "Oakland" about four years. They took it off the beach down here somewhere about Tillamook. Through his business relations with defendant he is frequently with him. He was with him in San Francisco in April last year, 1918. He recalled the incident of taking an automobile ride. Witness left here about the 12th of April, and Mr. Albers, he thought, arrived in San Francisco on the 19th. Witness met him at the depot with his local steamship agent and they went to dinner. Defendant had been drinking on the train some and had some for dinner, and he retired that night. After they went to dinner defendant remained at the bar. Witness went on up to bed. Saw in the morning when witness awakened defendant was not able to get up and he remained that way until the following Sunday week, that is, a week from

(Testimony of J. P. O'Neill.)

the following Sunday. Witness kept away from the office, fearing that defendant's brothers might find it out, until Friday night defendant's condition worried witness. Defendant's physical condition worried witness, and witness went to the brother and asked him if he didn't think it was advisable for them to take Mr. Albers to a sanitarium, as he was walking between the room of witness and his own, muttering to himself. So defendant's [186] brother told witness to take defendant out for an airing, Sunday, the following day, and to get him back home as quickly as he could. Witness left, he thought, the following Wednesday. It was Friday night the defendant was walking back and forth between the rooms nearly all night. He didn't sleep, witness didn't think, a wink. Witness has seen defendant drinking several times. When defendant is drinking he can walk all right. He can drink beer and wine, but the minute he takes whiskey he is a changed man. But it seems to go to his head, not to his feet. Sunday morning witness got up early and went for a walk, and when he got back it was about noon and witness persuaded defendant to get up and go down to the barber shop and get a shave about noontime, and he had a shave and a manicure and the young lady was late, or something. He had forgot the incident. Anyway, witness told her if she would remain that he would take her for a ride, or take her home, and while there defendant had, witness knew of, three drinks. He didn't know whether it was whiskey or brandy he had the porter bring in from the saloon. When defendant got in

(Testimony of J. P. O'Neill.)

the machine he fell asleep and witness thought it was only about three times that he awakened at all on the trip. They went down as far as Palo Alto and turned around and came back. Defendant did not carry on any conversation at all on the trip. That is intelligently. He muttered something at Palo Alto but witness could not understand him and did not think anyone else could. They turned around and started back, and halfway back Nature had asserted itself and he wanted to get out—he had awakened. The witness assisted him out of the machine. When he came back he looked at the two ladies that were in the machine, and he said, "Where did you come from," [187] he didn't even know them. A few days afterwards, when he went into the barber-shop and one of the ladies nodded to him, and defendant asked witness afterwards who she was and witness told defendant she had been on a machine ride with him and he didn't even know he had taken a ride. When he got back into the machine after getting out there on the road, addressing one of the ladies he said, "Where did you come from, Mamma," or something like that. One of the women took exceptions to it. Witness' recollection of it is that Mr. Albers and he were seated in the back seat and the two ladies were out in front, for he remembered one instance when they went around a turn defendant leaned up against him and he knew he was drooling at one time from the mouth and witness wiped his vest off. Witness would not be positive whether he introduced the young lady, Mrs. Gomes, to defendant there in the barber-shop. He

(Testimony of J. P. O'Neill.)

had no recollection. Witness' idea was that she was speaking to defendant or she was doing his work at that time when witness came into the shop. However, he might have introduced them; he would not be positive as to that. But he knew he was the one who invited Miss Gomes on that ride. On that trip he didn't hear defendant use any German phrase at all. Absolutely none. And he would say he did not. Witness was absolutely with defendant all the time and witness never heard defendant express himself at all. There was this time down at Palo Alto defendant muttered something that witness didn't believe anybody on earth could understand. He didn't know whether defendant spoke German or not; and then this other incident. Witness left the machine about ten minutes and called for the second young lady. Now, that is the only time that a conversation could be held like the one testified to by Mrs. Gomes, wherein she asserted [188] defendant stated he was a German spy and that he was ready to be shot then or any time; but defendant was asleep when witness left and he was asleep when he came back. Mrs. Gomes said nothing to witness about it. That could not have occurred at Palo Alto. Nothing of the kind occurred, no, sir. During that week that he was drinking he would not eat a morsel of food. He didn't have food for about ten days and he was drinking about three quarts of 3-Star Hennessy until that Saturday night witness went to the bartender himself and asked him if he could not send defendant up something that would sober him up. Witness was

(Testimony of J. P. O'Neill.)

worried about his condition. The bartender said, "I will go up and see him myself," and he brought up some beer, brought up three bottles of beer. And Henry drank it that night and the next morning early he telephoned for three more, as soon as the bar opened. And he drank those three bottles in the morning. That was besides the three drinks he had while he was getting shaved, yes, sir. No, sir, he did not during those times that he had been around with him hear Mr. Albers make any disloyal or seditious remarks of any kind. And witness had been perhaps the most intimate friend of Albers during this time. Shortly after, he thought it was a day or so after we got in the war, Mr. Albers came up and they were speaking about the schooner "Oakland," and he says, "Well, we ought to dispose of that as quickly as we can, for, thank God, the war now will soon be over." Defendant did not give the reason why it would soon be over, but witness inferred that it was on account of America entering the war. He was satisfied it meant that. They got down to the beach—he thought it was in December, and the boat was ready to be launched, and defendant asked Mr. Moody, who was launching the [189] boat if he had an American flag. Mr. Moody having answered in the negative, defendant said: "Well, before that boat is launched we must have one." They went over to Wheeler, trying to get one, but they could not, but the man who ran the soft drink place kindly volunteered to give them the flag provided they would replace it and they got the flag and brought it over

(Testimony of J. P. O'Neill.)

to the boat. Defendant's mind seems to be a blank after one of these sprees. Compared with his actions when he is sober, defendant drinking is a changed man entirely. He is really vicious and he is not responsible for what he says and does. When he is sober and *at* himself he is very docile and kindly.

On cross-examination the witness testified that he had been a close and intimate friend of Henry Albers for some years. He is his bondsman in this instance. When defendant was arrested witness was the man that arranged his bond and went on his bond. He has business association with defendant in the ownership of this boat "Oakland." Has no other business association with him. He had never heard him utter any pro-German sentiments and he has known his for twenty years. Personally witness didn't believe defendant ever did utter any pro-German statements. He thought if defendant ever had witness would have heard it, yes, sir. With reference to this trip to San Francisco in the spring of 1918, witness and Mr. Albers were staying at the Sutter Hotel. Witness had never known this Miss Gomes until he met her there. He would not be positive whether he learned that she was from Portland in talking with her and that he introduced her to Henry Albers. It might be; he would not want to say. If that is her recollection he would have no reason to think that was untrue. He [190] didn't think he had ever met her prior to this Sunday that they went out in the taxicab, or automobile.

(Testimony of J. P. O'Neill.)

He might have the previous Saturday. He knew he was in the barber-shop then. He thought it was about noon, or shortly after that he and Mr. Albers went to the barber-shop that day. Defendant was shaved and had a manicure. Witness was the one that suggested to Mrs. Gomes that if she would do that he would take her home or take her for a ride. They started from the hotel, there being just three of them at the beginning, Mr. Albers, himself and Miss Gomes. They later picked up a Miss Wade, and then rode out to Palo Alto. They were gone between two and three hours, he thought. He thought they left about one o'clock or so and got back about four—four or five. He would not be positive as to the time. He didn't know the distance down there. They would run about twenty miles an hour, something like that. He heard no conversation in the barber-shop. He was in the barber-shop just off and on while Mr. Albers was there. That being the case, of course he would not know what conversation occurred in the shop. He would not be positive, but his recollection was that he sat alongside of Mr. Albers in the car. He didn't see what reason Miss Gomes would have to make an incorrect statement, but he was almost positive she must be mistaken, for he recollected defendant at one time leaning over. However, she might recall it clearer than he did. He would not be positive. As they started out the young lady, Miss Gomes, said it was such a beautiful day that she thought a ride would do her good, so witness said, very well, if she cared he would get an

(Testimony of J. P. O'Neill.)

acquaintance of his and they would take a ride. That was before they started down to Palo Alto. He absolutely did not recall hearing Mr. Albers make any statements to the effect [191] that he was a Kaiser man or that he was a German spy, nor Deutschland uber alles. No, he did not recall any conversation between Miss Wade and Miss Gomes, or Miss Wade and himself to the effect that "We will have to get that man shut up or we will all be interned," no. He was positive Miss Wade never had that conversation with him. The subject of war, his recollection is, was never touched on, nor was anything said to the effect that the Kaiser is the greatest man in the world, no, sir. Nor that President Wilson has no brains, no, sir. Nor that there will be a revolution in the United States, no, sir. And he heard no statement by defendant that "I am a millionaire and will spend every cent I have to help Germany in this war," no, sir. Witness stated he was satisfied that Miss Gomes might have been telling the truth, but he thought if any conversation was held like that it was held in the barber-shop. She has it confused. He did not recall Miss Wade insisting that defendant be shut up and be made to be still with that kind of talk on the ride. He did not know of any reason why Miss Gomes would have reported these statements shortly thereafter if they are not true. He was not aware of any reason she had for reporting a lie about it. On that trip he didn't recall any conversation on the part of Mr. Albers except when he stepped out of the machine

(Testimony of J. P. O'Neill.)

and was gone for about five minutes and returned and he said, "Hello, Mamma, where did you come from?" or something to that effect, because Mr. Albers was asleep most of the time. He remembered that remark very distinctly. And defendant muttered something down at Stanford. He didn't know what that was, but it was only three or four words, whatever it was. These were the only things, he recalled distinctly, [192] that were said by Mr. Albers from the time they entered the barber-shop until they got back. That was all that was said, as far as Mr. Albers was concerned, that is to the knowledge of witness. He didn't think it was possible that defendant might have carried on a conversation without witness hearing it. He thought the witness Gomes was mistaken in saying that Miss Wade made serious objection to his talk. He thought Miss Wade would have spoken to him about it. The time he speaks of, the flag incident, was December 23, 1917, and they were all down at Wheeler, making their headquarters while he got the boat off the sands. It was a boat that had gone ashore near the mouth of the Nehalem and witness and defendant had taken it over and undertaken to salvage it. He did not know a man named Wardell, not by name, no. He had seen Mr. Albers under the influence of liquor considerable. Several different times, anyhow. He thinks he is not responsible for what he says or does when he is under the influence of liquor. At those times defendant is very antagonistic; rather assertive. Mr. Albers is very loquacious when he is

(Testimony of J. P. O'Neill.)
pretty well loaded up; that is his tendency. He is inclined to speak right out his views on anything.

On redirect examination witness testified that in testifying as to whether defendant had made any pro-German remarks at any time witness was not distinguishing between the time the United States was in the war and the period before. He misunderstood counsel. He had heard Mr. Albers—yes, he had heard him make remarks before the war; before we got in the war. Mostly against England. He never heard him make any remarks hostile to or in disparagement of the United States in any way, either before or after we went into [193] the war; no, sir. No, it was not in April, some time, 1917, that defendant changed his views concerning the war. That was quite a time ago they were discussed. He didn't know whether they were pro-German at that, even. Were discussing England. Defendant was very bitterly anti-English. He didn't think the outcome of the war was touched on at the time. Mr. Albers previous to the war was speaking about the German army. When Mr. Albers came back from Germany, witness thought it was 1906 or '07, he told witness he would not live over there if they gave him the whole country for the simple reason that he had no use for the military system. At that time he spoke disparagingly of the military organization of Germany. Witness had no recollection of discussing it with him during the time between July, 1914, and April of 1917. He did

(Testimony of J. P. O'Neill.)

not recall ever discussing any of the incidents of the war between those two dates with defendant. Witness was satisfied he had heard Mr. Albers discuss the war, but he could not say positively what it was or at what time. He didn't know, as a fact, that during that time, prior to the time we went into the war, Mr. Albers was very decidedly pro-German and discussed it on all occasions. It was rumored, but witness never discussed. He never heard him discuss the sinking of the "Lusitania" or the "Sussex" or the "Arabia" or the "Gullflight" or the Belgian atrocities. Never heard any discussion about the Christmas dinner in Paris. Never heard him make any bets. Never heard any discussion from Mr. Albers of the wonderful submarine campaign that was being waged by Germany; the organization of their sea force. Never discussed that with him, no, sir.

Testimony of Charles A. Barnard, for Defendant.

Thereupon CHARLES A. BARNARD was called as a witness on behalf of the defendant, and being first duly [194] sworn, testified as follows:

That he lived in Portland. Had lived there very near seven years. He is the sales agent for Eastern manufacturers of farm and mill machinery, grain-cleaning machinery and kindred lines. Had been in that business all his life, pretty nearly. He knows Henry Albers and the Albers Brothers Milling Company. He has had business with them. On August of this year, August 9, he and Mr. Albers made a trip

(Testimony of Charles A. Barnard.)

to Wasco, Oregon. They were together all day, all one day and night, and part of the next day. They left Portland here in the morning at seven-thirty. They were up there to inspect a flouring-mill with the possibility of Albers Brothers Milling Company investing in the machinery that was in the mill. Yes, he discussed the war with Mr. Albers on that trip. They had talk about it. No one else was in the discussion. Witness had heard some little vague rumors that had come to him in an indirect way that Mr. Albers was not a citizen, but witness did not think particularly about that. Their conversation was general, just as one would naturally talk about those things at that time. He didn't know that he could repeat word for word anything that was said. The conversation was general. Of course they talked about the war and the situation, the relative conditions as between the United States and Germany. The United States and its Allies, with the other nations. And Mr. Albers also during the day entered into quite a lengthy description of the trips that he had taken back and with relation to his meeting his relatives and his old friends there in Germany. The conversation was general, but its nature was of such a character that he could not discover that defendant was in any way in sympathy with Germany as against the United States. [**195**] He seemed to be very strong in favor of the United States. He knew in talking about the situation at that time, that was at the time the Allies were in the ascendancy, and it was stated by Mr. Albers in sub-

(Testimony of Charles A. Barnard.)

stance, and by both of them—they were both talking about the same line—that the war would eventually end in the success of the Allies. It was bound to be that way—it had to be that way, and that was the only successful termination of the war, and defendant was quite in sympathy; quite strongly in sympathy with the Allies at that time, and particularly emphasized at different times the fact that he was an American citizen and he was in sympathy with America in this struggle. Of course under the circumstances was rather keen to observe if there would be any tendency to sympathy, but he could not detect anything in any way whatever. Defendant was clear in his mind, absolutely; witness knew that. Witness has a son-in-law who is a Colonel in the United States Army and a son who is a First Lieutentant, or was a First Lieutenant in artillery. The son has had his discharge and is now in Kansas City. Mr. Albers' reference to Germany and about his meeting his old friends there in general was a regular detail of his trip. In fact, it was quite lengthy. They talked a great deal about it, because defendant expressed himself regarding the conditions over there and his friends and the sociability and his enjoyment there. It was along that line. He enjoyed himself very much over there; had a delightful visit. Witness could not recall that defendant particularly expressed himself with reference to his attitude toward the Kaiser, the war party of Germany, only that his expressions were to the effect that the war must close by the defeat of Germany.

(Testimony of Charles A. Barnard.)

Witness recalled that defendant expressed himself [196] as though it would be a hard and bitter fight and he regretted the conditions very much, that they existed—the terrible loss of life and property, but he did express himself that the fighting, of course, up to that time had all been on foreign soil and that it would probably be a hard, difficult fight if they did get on to the German soil. Witness could recall that in an indirect way. Witness was quite in accord with the idea. That was the idea witness had of the war at that time. Witness was born in Canada of American parents and he has lived in the United States all his life except the first year or so. His parents were American and he was not required to become naturalized. His people were already citizens, temporarily in Canada.

On cross-examination the witness testified that he had lived in Portland about seven years—seven years in June. From the beginning he had been a pronounced pro-Ally; quite so, and he didn't hesitate to let people know where he stood. At the beginning of the war witness was not strongly a pro-American. He was—he had always been pro-American, but then he wasn't pro—not antagonistic to the Germans entirely before the war, before he entered the war. Witness explained he meant when the war first opened. He was rather undecided at that time, simply because from lack of knowledge he didn't know who was right or wrong. After the invasion of Belgium he changed his mind immediately and has very

(Testimony of Charles A. Barnard.)

fixed opinions. He has asserted those opinions on all occasions. Didn't hide his light under a bushel in that respect, not at all. He always was decidedly pro-American and asserted himself in that respect, always. Having in mind airy rumors he had heard concerning Albers, of course it made him a little keen to observe defendant's remarks, yes, and defendant's attitude, [197] that he would take. These rumors were not generally to the effect that there might be some question as to Mr. Albers' loyalty to the United States. No, not that. More that—the rumors that reached witness were that when defendant was in his cups he was liable to say things he ought not to say. He showed no evidence of drinking at all. The expression witness got all the way through was that defendant was strongly of the opinion that the Allies must win. The impression witness formed from their conversation was that it was quite apparent to defendant that there was no possible outcome to the war except the defeat of Germany. At that time conditions had somewhat changed since earlier in the war, of course. He probably met Mr. Albers first in the neighborhood of eighteen or twenty years ago. He hadn't been well acquainted with him. His acquaintance had been more during the last six or seven years. Witness' business threw him in touch with defendant a good deal more during the last six or seven years, and his relations with defendant have been fairly close in a business way. He was thrown with the mill people more than with other people in the business world. He could not recall that he ever

(Testimony of Charles A. Barnard.)

discussed and exchanged his views with defendant prior to this time when they went up to Wasco, only in a general way, that they had conversations in the office when Mr. Albers was present. Mr. Albers had expressed his views to witness and witness had expressed his before that time, generally, in a general way, yes.

On redirect examination the witness testified that that the appearances of victory for the Allies in August increased rapidly after that date, certainly they did, until up to the time, October 8, it had become a certainty that the Allies would win. That seems to be the record, in short order. [198] Defendant when he was talking to witness seemed to be very frank and open in his conversation. No guard in any way whatever.

Testimony of Henry Albers, in His Own Behalf.

Thereupon HENRY ALBERS, the defendant, was called as a witness in his own behalf, and being first duly sworn, testified as follows:

That he was the defendant in this case. That he is fifty-two years old; was born on the 13th day of April, 1866, in the Kingdom of Hanover, in the little town of Lingen, on the River Ems. His father was a grain merchant. He did not do any farming that defendant knew of. He had a little garden, that is all. In the family were six boys and three girls. Defendant came to this country in 1891, being twenty-five years old at the time. He had two brothers that had preceded him here. Herman and Bernard.

(Testimony of Henry Albers.)

Herman was never in Portland; he died in Terre Haute, Indiana. He was a cabinet-maker, six years older than defendant. Bernard came to Oregon from Terre Haute. Two years after he was there he came to Portland. Bernard came to the United States in 1887, defendant thought, and in 1889 came from Indiana to Portland. Defendant and his brother Will came next. Will is two years younger than defendant. Defendant and Will came straight to Oregon, from Lingen to Portland, Oregon. When defendant came to Portland he worked at all kinds of jobs. Worked in the kitchen at Bishop Scott Academy, baked bread, tended the butcher-shop and done all kinds of work around the kitchen. He learned a little of the trade of a baker in Germany before he came. He knew enough about the baker business to bake bread. That was about all. He didn't learn it thoroughly. Before he came to this country he went to school until fourteen years of age, public school, then he [199] went to learn a trade for a few years. The milling business. Not a flour, a cereal mill. Bernard was not a miller. Defendant has another brother who worked in a mill. He learned the milling business in Germany. That was George. Besides baking defendant did everything that came along in the kitchen. Peeled potatoes, washed dishes. He worked as a cook at the Seaside Hotel about three or four months. He could not remember exactly. Then he came back to Portland and got a job with the McKay Building, looking after the machinery, running the elevator. Did all kinds

(Testimony of Henry Albers.)

of work generally. He was the janitor there and done everything there, swept the floor, collected rent and everything that came along. He did that about three years. The first day of May, '95, his brother and Mrs. Schneider and himself started in the milling business. Started on Front and Main Streets. Mrs. Schneider, Bernard Albers and Henry Albers. They called it the United States Mills; Albers and Schneider. It was a little feed and cereal mill. One of his youngest brothers, Frank, had been here about a year then. George was in Seattle. He came a year after defendant came. George was in Cincinnati, defendant thought, a year or two and then when they started business George came out here too. George worked, drove team, and the youngest brother, Frank, was in the store with Mrs. Schneider, and his other brother drove a team, also. Will drove a team. Defendant done the mill. Mrs. Schneider the inside work and his brother tended the office. Will wasn't a stockholder, but he was working there. He was on the farm for a while in Washington County. Will farmed over in Washington County, defendant thought, two or three years. He could not say. He began to work in the mill in '06 or '07. Defendant could not say for sure. His sister came to this country in '93 or '94, he could not [200] remember exactly. He has only one sister alive, the other two died in Germany before the boys came out here. Defendant's mother died when he was eight years old. His father came out in '96. He died, defendant thought, in the fall of '96. Came out here in the

(Testimony of Henry Albers.)

spring. When defendant and his brothers left Germany they left no property there. They never owned any property in Germany, none that he knew of. His father owned some but defendant guessed he sold it before he left there. Only his oldest brother and himself were connected with the little mill started on Front and Main Streets in 1897 or '8. Mrs. Schneider sold out in 1901 to defendant's oldest brother Bernard. The one that is dead. And that stock is divided around among the rest of them. He became connected with the business in 1902. It is that mill that has developed into this string of mills that the Albers Milling Company owns. They own mills now at Portland, Seattle, Bellingham, San Francisco, Los Angeles, Oakland and Ogden. They have mills at each of those places. Defendant builds practically most of the mills. He makes the plans when they build it and see that they get it in running shape, and the machinery, most of it. He is a machinery man. He doesn't have much to do with the clerical and office work of the business, and never bothers about sales. He looks after the mill, sees that it keeps going. That is his part of the business. He has been doing that practically all the time. The last two or three years he goes around the mill to look after the running part of it one place and another, that is about all. He don't work like he used to, for day and night. He don't do that any more for the last four or five years. He used to work day and night lots of times. Because of that he contracted what they call catarrh and he has been [201] doc-

(Testimony of Henry Albers.)

toring for years for that. Affects him all around here (indicating), right up over the top of his eye. He expected that came from dust from the flour. He was back to Germany in 1901 and again in 1912, just the two times since he came here. He never at any time had any connection with any official or agent of Germany. Neither in this country or in Germany. In no case. He never had any transactions or any negotiations with any such officers or agents. He never had a cent of property or any investment in Germany of any kind. His property holdings and interests are located all over in this country, in the mills. All in the mills and mill property. He came from the Kingdom of Hanover. When he left it belonged to the Prussian government. He never served in the German army. He came free. He went to what they call muster and came free. There had been something wrong with his condition. He didn't know what. They didn't enlist him. He was rejected. His oldest brother Herman served in the German army. Bernard was in a little while. He came out again. Not one of these younger boys served in the German army. Herman and Bernard are dead. Bernard died in 1908 and Herman died in 1895. When the war in 1914 started defendant was in South America. In Buenos Aires. He went for business reasons to see what was going on in that country. Bought some corn there. They shipped in several carloads of corn here to San Francisco at that time. Defendant went there to see if the corn was fit to be shipped out of the country or

(Testimony of Henry Albers.)

not; that is the reason he went out. Purely in connection with the milling business. Never had any connection in any way with the German government or with German purposes. Neither the German government nor any German interest ever had any [202] interest in the Albers Milling Company, never at any time. Defendant thought he had about a thousand marks when he left Germany, a few hundred dollars. His brother Bernard and his younger brother had all about the same. About three hundred dollars. That is what he had when he got to New York. When the war between Germany and France commenced in 1914 defendant did not take any position, as he knew of. He was at Buenos Aires. He didn't know what was what. He could not get any cables through. He didn't know what was going on here and he tried to rush back to his home country. By home country he means the United States. To get home it took him thirty-five days on the water, then from New York to here he thought five or six days. He stopped a few days in New York and in Chicago. After that he never did go around abusing the Allies. Never did go around praising Germany. He discussed with several people. He went to the Board of Trade and Grain Exchange. He talked like everybody else, he didn't think he ever did take the side of Germany. You know it was general discussion. Some fellow would call him Hindenburg, this and that, and he would call them back Kitchener, something like that, or Haig, something like that. They had that discus-

(Testimony of Henry Albers.)

sion, sure. Usually in the way of bantering, certainly. At this time, yes, maybe they had some discussion about the reports of the atrocities alleged to have been perpetrated by the Germans, that is all. He may have discussed that. Sure he thought the papers were making it a little strong, in some cases they did; pretty sure of it. He never thought the German people were capable of those things. After this country entered the war in 1917, in April, he never did from that time on, in any conversation, at any place, as far as he could recall, make [203] any statement antagonistic to the Government of the United States. Never, no place. On the train that was all blank to him. He didn't know anything about it. All he remembered, when he left Frisco, ten or eleven, ten o'clock, he met several friends of his coming to the hotel and they had a few drinks, and more, and more, and more, and more, then he went to the ferry, took a taxi and went to the ferry and when he crossed the ferry he met Mr. Swetland, the only one man he remembered meeting on the train. Don't remember seeing anybody else. Don't know anything about the 8th day of October, or next day when he got up. Don't recall going into that washroom there at all, nor those men being around him, talking to him. Don't remember saying anything. Don't know that he saw anybody except that going on the train he met Swetland on the ferry. He never saw Bendixen before, before he saw him here. He never saw F. B. Tichenor except here on the witness-stand. Didn't know Mead before. He never saw

(Testimony of Henry Albers.)

Kinney; never saw Kinney that he knew. Allen and Lewis are not competitors of Albers Brothers Milling Company, they are customers. The witness Bendixen in testifying to the meaning of schlach don't know what he is talking about. He says schlach means destroy everything. That man absolutely don't know what he is talking about. He don't know German. Schlach means strike. Schlach is to strike and that is all there is to it. He didn't know anything about it. The statement of witnesses that he had said he never got anything except sheis, sheis in America, he didn't think he ever used that word. Both before and after the war he has always been for his country here. Always was, and why shouldn't he? All he has is here. He [204] never did complain that in America he got the worst of it in any way. Never did. Whenever he had any discussion about it he always told them it was the only country to live in. He told them that people didn't know what they had here. A good many didn't believe him. He always told them that because he had been around a little. He knew what this country means, what it is. He had some experiences in Germany when he was over there. They didn't do much to him. When he was there the last time he was over there he rode around with a machine and every corner he turned around was a policeman. He was disgusted with that. Didn't do particularly anything to him, but too much militarism in it, he thought. He was arrested—not arrested, they just come over and hand you a paper and you

(Testimony of Henry Albers.)

pay a certain fine. They don't put you in jail, they don't do that, they come to the hotel and say, "Here, you didn't have any lights; here is a fine, five or six or seven marks," whatever it was, and you would pay it, and that is all there was to it. That is all there is to it. He guessed he expressed himself in hostility to that. In Hanover they never hurrah for the Kaiser. Hanover was pretty bitter. He and his boy companion were arrested for singing a song on the street about Bismarck. They put them in jail. They could not do it. He remembered that well, in the '70's. They kept Bismarck's picture in a back place, some place. They became Prussian after witness was born, he thought four or five months, he didn't recall. He did not know that he ever found fault with the Food Department. He didn't think he ever discussed with Mr. Titus that part at all. He had some discussion with him in a talk. That was after he got back from South America, an early stage of the war, when the war commenced between [205] Prussia and France and England. They never discussed any food at that time. There was no Food Administration at that time. The food condition he never discussed with Mr. Titus because Mr. Titus didn't know anything about it. He might have talked to him about whether America was being influenced by the British press. Something to that effect. He would not be sure if he did or didn't. Defendant is not much of a newspaper reader. He never reads articles clear through, as a rule. He reads the headings, headlines, that is about all. That

(Testimony of Henry Albers.)

was so even during the war. He might have explained to Mr. Titus about the Prussian army. He told him about how they were trained, how the system was there. He never did express the opinion that the United States soldiers would not stand much chance with them fellows. He never had any heated discussions with Mr. Titus. He didn't see Titus in his office. In the morning defendant's brother would go out to the mill and defendant would go to the office, since they had an office up town here. Defendant got down to the office about nine o'clock, sometimes eight, sometimes seven, sometimes ten. Defendant's brother would come up to the office at noon, at lunch time, and defendant would go with their hayman—what he called their hayman, looks after the hay department, down to the mill and stay there a couple of hours and look after everything and go back to the office and go home. Defendant goes through the mill and through the upper dock and goes through the lower dock. Titus was on the lower dock at that time and once in a while a telephone would ring and defendant would answer the telephone. Once in a while Titus was there. Nine out of ten times Titus wasn't there at all, because he would leave for town at half past eleven [206] go to the bank and see some customers, and he would never come back much before half past three or four o'clock, about the time defendant left. A good many times defendant met him on Front Street near the steel bridge. Once in a while he saw Titus on the dock. Titus is always on the lower dock. The

(Testimony of Henry Albers.)

American-Hawaiian office was vacant after we went into the war. The Hawaiian dock was packed full of Government supplies. There was Government supplies every place, practically all over the place. All these docks were covered with Government supplies. At that time—after we entered the war, there was a lot of supplies there. He could not say exactly, but a good many million dollars there now and been there ever since we entered the war. Yes, many thousand tons of stuff of all descriptions. All Government war stuff, everything. They got practically three-quarters of their (Albers Brothers Milling Company's) warehouse and dock space. Practically all filled with Government supplies. He didn't think he ever had a talk with Mr. Titus after we went into the war. He met him in the elevator. Titus would come to their office once in a while and say good morning, good day, something like that, that was about all. That is right. He talked to Mr. Titus about some coal after we went into the war. He talked with Mr. Titus when they had the "Oakland" loaded to send to San Francisco. The schooner "Oakland" they salvaged off the beach on the "Manzanita," the captain came out and says, "We need coal," as they wanted to go out the next morning. Defendant knew this Titus had coal then on the dock, on Dock Three, and he went over to Titus and he says, "Have you got coal? Where does that coal belong?" Titus replied, "Yes, I will let you have that," and he gave the price and defendant said all right. That was March 28, or about the 30th.

(Testimony of Henry Albers.)

He could not say the [207] day, but it was the latter part of March, 1918. Defendant was not in Portland at the time fixed by Mr. Titus when a conversation was held in the American-Hawaiian office. About July 20, 1917. Defendant was in California because that was in the high water stage of the river and defendant remembered he was not here at all. He came back after the high-water was gone, and Titus had moved back to the same office where he always was. When defendant went away Titus had not moved up to the Hawaiian-American dock. He only knows Titus was up there because he said he was up in the American-Hawaiian office. Defendant don't know that he was ever there at all. In any discussions he had with Mr. Titus defendant never did try to persuade him to do anything. He guessed they discussed about the war. Sometimes Mr. Titus took issue with defendant on opinions defendant had. He could not recollect what they were, but he would not have any talk with him, if a man don't talk back. If a man don't talk back you simply stop and go away. They never had a dispute that he knew of. Mr. Titus was always friendly, as far as defendant knew, and perfectly agreeable. Mr. Titus might have remonstrated with defendant before we got into the war, about some of defendant's opinions or views or remarks. He must have been pro-English, else they would not have had any discussion. Defendant did not know that he had any antagonism to Mr. McAdoo, the Director General of Railroads and the Secretary of the Treasury. Defendant never had

(Testimony of Henry Albers.)

any trouble with the railroads, under his administration. He didn't recall talking about McAdoo at all. He didn't see why he should say that McAdoo was a son of a bitch. He hadn't done anything to defendant. He didn't think he ever did kick about the way he ran the railroads. [208] Of course he travels a few times, he always gets there. He didn't think he ever discussed, did not know that he ever discussed the subject of whether America was influenced by the British press to take the position it did in the war, or that defendant thought the United States had no cause to attack Germany. He didn't think he ever, at the time he talked with Mr. Titus, expressed the opinion that a revolution might occur in the United States within a short time, or at least within ten years. Didn't recall that he had a talk with anybody about this revolutionary stuff, not that he knew of. Never did entertain some notion about that, that he knew of. He didn't know anything about any revolution. Did not think there would be a revolution. He never did at any time, either before or after the United States entered the war, express any sentiment or make any statement, even intended to or calculated to show lack of allegiance or lack of fidelity or lack of attachment to its cause, at no time. He was naturalized he thought in December, 1900, and he has been a citizen of the United States ever since, but voted regularly at elections. He voted here before he took out his second papers. Out of all the mills one hundred and two boys, he thought, went from the firm into the service. He

(Testimony of Henry Albers.)

wasn't around the other mills, only two or three times a year. But he was here practically every day when he was in town. He thought eight—seven or eight men went out of the office, and out of the whole plant 46 or 48. He didn't know how many of them were volunteers. He knew there were several volunteers out of the office and they all became officers. All of those out of the office were volunteers but one. Defendant always told them to go in and it would be a good thing for a young man. He believes [209] in militarism. He told them all that they should go in and make men out of themselves. By militarism he means they should go into the army, military training. He advised them all to go as quick as possible. He told them as soon as they came back they would have their positions back and if they needed anything while they were gone to let him know and he would help them all he could. He knew of one boy who claimed an exemption. They called him Archie —Sims, he thought. His mother was old and defendant always told him: "Your mother will get through; you better go." He told him to go into the army and he would come back—he was a little afraid and the rest of the boys joshed him and defendant told him he would better pack up and go. He was claiming an exemption on account of his mother. Concerning Liberty Bonds and the other war activities, they had a meeting for the Albers—they generally have a meeting once a week, maybe not all the directors, and they took up this matter and it was decided on buying so much, whatever we could stand, and defendant

(Testimony of Henry Albers.)
recommended to buy that certain amount. He never did try to obstruct or prevent any of these things and never did try to obstruct or prevent any man from enlisting or going into the army. He thought practically all of them who enlisted there came to the office after they got their uniforms on, to bid defendant goodbye; practically all of them. He never did tell a single one of these fellows to do anything disloyal or insubordinate. He told them to go ahead and get through with it. He thought practically all of these men that went out of the office, except one, are officers now. All made good men.

On cross-examination the defendant testified: Such education as he received in school he received in Germany [210] prior to coming to this country. He didn't attend school after coming here, never. He engaged in milling in America for the first time in '95. That is when he left the employ of the McKay Building, and from that time on he has been in the business every day. And the Albers Brothers concern now has plants in Bellingham, Seattle, Tacoma, Portland, San Francisco, Oakland and Odgen. All these plants are owned by Albers Brothers Milling Company, only one corporation. Of that corporation was the president until this occurrence occurred on the train. He had been president from the beginning, since the Albers Brothers Milling Company started. Not before. Before it was Albers and Schneider, or the U. S. Milling Company. Defendant and his present brothers control the corporation. They own and control the stock. There are

(Testimony of Henry Albers.)

several outside stockholders; some of them pretty fair amounts, others small. He could not say that there are any stockholders outside of the Albers family that own as much stock as defendant or his brother Will. He thought there is one family in San Francisco, the Denman family. They are heavy stockholders. They don't own the control, however. Defendant and his three brothers, Will, George and Frank, do control the corporation. They are all on the board of directors. When defendant returned to Germany in 1901 he was there about two months and a half. In his home town. In Germany, where he was born. He traveled around; he went to Russia, Switzerland. That time he had his sister with him. He was abroad that time about two months and a half. He returned to Germany in 1912 for a visit and was there that time about two and one-half to three months. He went to Alsace Lorraine, Switzerland, and [211] he was a little ways into Russia and came back to his home town. He was just over the border in Russia from Posen, in Rechan. Had a friend living there. He was there only three or four days and went back. After he left Germany he returned directly to New York. Stopped there a few days, Chicago, and then back home. When the war broke out in 1914 he was in South America in the Argentine. He left Portland in the latter part of May, was in New York three days then took the steamer and it took them twenty-five days to get there. He returned to Portland from that trip in September. He arrived in Argen-

(Testimony of Henry Albers.)

tine, he thought, about two weeks or ten days before the war broke out. He left the Argentine, he thought, about a month or five weeks after the European war broke out. At that time he was in Brazil a few days, when the steamer was stopped there. He thought the steamer was lying there five days. He went there with a friend that knows that country pretty well and he wanted to see the conditions of that country. He went to Trinidad and was in Trinidad, Port of Spain and Barbadoes and Rio Janeiro. He just went there with a friend, because he was in the grain and flouring line, too. He went to see what was going on there. He went to Bahia, that is Brazil; Rio Janeiro and Santos, a big coffee house there. He arrived back in New York the latter part of August, was in New York five or six days, he thought; could not say exactly the time. He visited the Grain Exchange and Albers Brothers Milling Company's agent. They had an agent there at that time. Now they have an office there. He didn't recall, didn't remember the name of the agent. He guessed the agent is still in New York. They have an agent down there now, their own office. At that time they didn't [212] have it, they had a strange agent. He visited nobody else in New York that he knew of. He didn't visit the German Consulate, don't know him. Didn't visit nobody. He did not meet the Consul or any of his representatives in New York, not a one. From New York he went to Chicago and stayed there four or five days. He didn't remember. He just went in and saw the mill-

(Testimony of Henry Albers.)

ing people there and the grain people. All the business he had was in machinery houses. He visited Quaker Oats Company, a man named Stewart—he knew him pretty well—and a machinery house by the name of Rich and Gump. He thought Rich's initials was G. He didn't know what initial it is. He was there several times, he could not exactly say how long. From Chicago he came straight to Portland. This man Rich he visited in Chicago is a machinery man, makes special machinery for oat purposes. B. Rich is his name, correct. Defendant didn't know anything about his financial connections. He knew every time they bought a machine they had to pay the money right away. He didn't know anything about whether Rich was connected with the Trans-Atlantic Trust Company. He didn't know whether the Trans-Atlantic Trust Company was the company that was dealing direct with the German Foreign Office. He didn't know whether Mr. B. Rich was the active agent of it. The man Rich he knew had a little two by four office in an old building and had his own machinery. He is an old man. Defendant thinks he is dead now. Seventy or eighty years old. When defendant left Chicago after four or five days he came directly to Portland and made no other stops. That brought him home some time in September or October, 1914. Defendant hadn't been east at all since that time. He was not in the east in 1915, nor in 1916. [213] He was sure of that. Never had any business in Baltimore; never was in Baltimore. Didn't think he ever told anybody he had

(Testimony of Henry Albers.)

been in Baltimore, because he wasn't there. Sure, his brothers had been east since 1914; his brother George had been back there and his brother Frank, in New York. Frank was there once or twice. He was there some time ago, defendant guessed. There a year ago. They generally make a visit to the New York office once a year. One of them. It might be the company erected a small warehouse up in Union County in the summer of 1916. Defendant thought it was in 1915. At Haines, Oregon. He was there a month. He stayed at the Hot Lake Hotel at that time. He never had any conversation there with a man names Haines, not that he knew of. He didn't know any Haines up there. He did not at that time discuss a recent trip to Baltimore. Never, no. He did not tell Mr. Haines that he had gone to Baltimore when the "Deutschland" came in, nor that he had met the captain and officers, and never told him that he had been over the "Deutschland," Never told him. He had no such discussion with anybody up there, in Hot Lake. He didn't tell Mr. Haines or anyone else that he had gone to Baltimore, had met the "Deutschland" when it came in and had met the officers and the captain, Captain Koenig. How could he? He wasn't there. He was at Hot Lake in September to build a warehouse. He was there practically all through the month of September, and he had never been to Baltimore, never in his life. It was in 1914 that he was in the east. He thought he spent most of the time in 1915 in Portland. Yes, he recalled being away from Portland in 1915. He

(Testimony of Henry Albers.)

had been in Frisco in 1915, he was in Los Angeles, but he could not recall the date. Most of the year was spent [214] in Portland; yes, sir. In 1916 he was in Frisco a couple of times. He could not say without looking it up what months he was in San Francisco. He knew he was in Portland on the 18th day of April. No, 1917. 1916 he was in Portland. He thought in the fall of the year he was in San Francisco; in November and December, he thought pretty near up to Christmas. In 1917 he spent most of his time in Portland. He was in San Francisco a few times. During those two years he stayed some place for a week, others two weeks, others a month, and then moved on again, but he visited all of the Albers plants during these two years rather constantly. He stayed in Portland about a month at a time. Yes, he had several conversations at the Board of Trade or the Grain Exchange; he could not recall every one of them. He knew there was talk about the war several times. It was mostly in 1914, after he came back from South America. He went to the Exchange frequently after that. After we got into the war he never went to the Exchange. He didn't think he was ever there once. In 1914 or '15 or '16 he was at the Merchants Exchange a good many times. And he might have had a number of arguments there with the various people about war conditions. He had some talk about the war. He didn't think it generally started and finished by defendant championing the cause, somebody else taking the Allied cause. He might sometimes have taken the Allied

(Testimony of Henry Albers.)

cause, yes. Could not remember the date that he ever took the Allied cause and he could not recall any instance when he did. He thought he took the Allied cause at the time Germany invaded Belgium. Well, sure he took the Allied cause then. He thought that Germany never had any right to go through Belgium. He never did [215] bet on the Emperor having his Christmas dinner in Paris. No. Never made a bet of that kind with anybody. He was sure about it. Oh, well, it was just in a joshing way, you know that somebody or some men called defendant Hindenburg. Oh, no, no no, they were not calling defendant General French or Marshal Foch or anything of that kind. No, they never did that. He referred to the other parties as Haig or Kitchener, something like that, when they addressed defendant as Hindenburg. He generally put something like that back again. If he mentioned General Haig's name it must have been after he became Commander. He thought General Haig became Commander in Chief in 1916. It was pretty hard for defendant to remember what year or years he had those talks with Mr. Titus, because defendant went to the dock frequently when he was here. Walk through it and he didn't think that he talked more than once or twice with Mr. Titus, because he wasn't there most of the time. He talked with Titus the time he bought some coal from him. He might have talked with him other times, but not that he knew of. So far as he knew he was on good terms with Titus at the time the war broke out. He never had any dispute with Titus, and he

(Testimony of Henry Albers.)

thought those good terms continued for some time. Defendant never knew that relations became a little strained later. Never did, that he knew of. No, he didn't remember having talked to Titus about reports of the German atrocities as being false. There is no personal matter that would cause Mr. Titus to lie about it, that defendant knew of, except this coal matter, maybe. He didn't know. There was some dispute about the coal matter, because defendant told Titus they had a boat lying there that had to go out next morning. He had to get the coal in her—the captain had to go out. Defendant asked Mr. Titus if he [216] had coal, Titus says yes, it was his coal. Defendant says, "Whatever the price is, get it ready and we will put it in the ship," and then defendant told him to collect the money in the office, whatever it was. Defendant didn't know where the coal belonged to. Mr. Titus was on the dock and took care of that coal. That was the latter part of March, 1918, and prior to that time there was no reason he could recall why Mr. Titus should have misstated any facts about it. He could not exactly say how the bill was paid, but there was some dispute about that bill. He thought at that time Titus owed money to the concern and they wanted to deduct it out of the bill. There was some dispute about it that the Secretary or their cashier, maybe, can explain better than defendant can. Defendant is not very familiar with the books. Don't attend to that part of it. Whatever difference there was, it was after March 1, 1918. He

(Testimony of Henry Albers.)

never did have any conversation with Mr. Titus to the effect that America had no cause for going into the war. He did not remember having a conversation to the effect that we could never lick the Kaiser. Never said that. He did not recall having had a conversation with Mr. Titus in substance wherein defendant made a statement that all the institutions of the United States were inferior to those of Germany. He did not recall discussing the Food Administration to Titus at all. No, never. No, he never made the statement that the United States Food Administration was outrageous and ridiculous and that it was no good. He did not know that he ever made the statement to Mr. Titus that the United States and its citizens are dominated by the British press, meaning the English papers. Defendant could not think that. He didn't recollect that at all, that he ever talked about it. He didn't think he ever thought [217] anything about that. He wasn't a very constant reader of the papers. He read most any papers that came along. Most any paper that comes along. Nothing of any paper particularly, he read the headings and that was about all there was to it. He looked at the headings of the "Oregonian," the "Telegram" and the "Journal" pretty near every day. He has read the "Nachrichten." No, he is not a very steady reader of that paper. At one time, years ago, before he could make himself clear in the English language, yes, he read the German paper. After the war broke out in 1914 he was not a steady reader of that paper. He got the paper

(Testimony of Henry Albers.)

once in a while because it was sold on the street, and he bought it. He is not a subscriber to it. He was at one time, yes, some years ago. He got his war news, or the news concerning the war, from all the papers. Some of it was the "Oregonian." From all the papers. He never got the paper in the mill office, the German paper, at that time, because he didn't have no time to read the paper, was so busy in the mill. All he had was a little place. It is only room for one table, for one desk and a chair. He never saw the Italian that was on the stand the other day, Cerrano, in his office. He could not say that Cerrano wasn't, in so far as there are so many people working—he could not. Up here in the Railway Exchange Building he had a German paper there which was delivered to him. The "Nachrichten." That is all the German paper he received. He doesn't take the "Staats Zeitung," of New York. He did not take any German papers into Mr. Titus' office that he knew of. He might have one in his pocket. He had a paper sometimes in his pocket. Left it there if Mr. Titus wanted to see it. He did not know that Mr. Titus asked to let him see it. He didn't think Mr. [218] Titus could read German. He didn't know. He had no idea if he could or not. No, Mr. Titus didn't ask him to leave the German paper there, sure not. He never did tell Mr. Titus that the place to get the news of what was going on in the war was to get it from the German paper. He never did make a statement to Mr. Titus that the United States soldiers were a bunch of amateurs and

(Testimony of Henry Albers.)

would have no chance against professionals like the Germans and that they made a mistake in attacking Germany. He never made such a statement as that, no, sir. He never did discuss revolution with Mr. Titus. He never discussed that with anybody. He was sure of that. It seemed to him that way—that these witnesses who have testified that defendant did, they sort of conspired against him. Mr. Titus might have joined in that conspiracy; he didn't know. He would not say that for sure. Owing to the talk Mr. Titus made defendant rather thought so. Yes, he remembered that man (David McKinnon) for a good many years. He used to sell babbitt for a company in San Francisco—babbitt for bearings. He never talked to that man in Frisco that he knew of. He met him here in Portland; came into the office frequently. He did not know that he had any talks with Mr. Titus after we entered the war. The only time he knew he talked to Titus was when he asked him about the coal. Never had any discussion about it at all. Asked him if the coal was any good for cooking purposes and stuff like that. Asked him the price. That was all there was to it. He did not have any discussion with him about the war at that time. No, never talked to him. Nor at any other time that he knew of. He didn't know whether Titus was pro-Ally or pro-English. Didn't discuss that question with him. Before the United [219] States entered the war defendant was in sympathy with the German people but never with the Prussian government in his life. Never was, no, sir. He did

(Testimony of Henry Albers.)

not have anything against the English, because they never harmed him any that he knew. There might have been some talk as between the British and the German cause in the conduct of the war prior to the time we went into the war. He didn't know; he didn't remember. There was a lot of war talk. He didn't recall that he ever talked anything about the English people. Or about the English government or the Allied governments. No, he never did. He knew the German militarism was pretty strong. Also he may have said that the German cause would prevail in the war because he knew the German military. He never made a bet to that effect, that the German cause would win. He was pretty sure that he never put up a penny in his life on a war bet with anybody. He had never discussed with anybody prior to the time we went into the war or afterward the likelihood of a revolution coming on in this country. Never mentioned that to anyone. The boat "Oakland" is the one they salvaged over at the mouth of the Nehalem River. No, he did not remember Wardell, the man that said he was working for the District Attorney at Tillamook County. Defendant knew they were in that soft drink place. They played a couple of games. That was the time they wanted to launch the boat and they didn't have no flag and defendant asked the man if he could not give them a flag—they could not buy a flag in Wheeler. The man finally gave this flag and they sent it out there a couple of days afterwards. De-

(Testimony of Henry Albers.)

fendant never talked to Wardell, never saw the man that he knew of. He didn't discuss the submarine question with anybody there. He did not express any opinion that as soon as Germany got her submarines started there would not be a single [220] boat from the United States get to Europe. He recalled being at the Sutter Hotel in San Francisco in the early part of 1918 with John O'Neill. He didn't know anything about the Sunday they took a ride down to Stanford University, Palo Alto; didn't remember that. He was in the barber-shop once, he remembered that, but when that was he didn't know. He didn't recall talking to anybody there, any young lady who said she came from Oregon. He did recollect something about a young lady, her home was in Milwaukie, there was a lady in there came from Milwaukie, because she asked him about Milwaukie, and defendant talked about Milwaukie with her. Various people were not mentioned that were known to both of them, because defendant had only lived a little while, he hardly knew anybody, he only knew the banker and the station keeper. Streib he thought was the banker. That wasn't the day they took the ride down to Palo Alto. He didn't think it was. He knew he talked to the young lady there. Yes, sir, he raises China pheasants. Yes, he might have discussed with Miss Gomes or some young lady in the barber-shop or some other lady in the barber-shop at the Sutter Hotel the pheasants he had at home. He might have discussed something like that. They may have talked about birds and stuff like that, yes. As

(Testimony of Henry Albers.)

to those two things Miss Gomes might be correct. He didn't know when he was there. She might be correct. He didn't know, he didn't remember anything about the trip down to Palo Alto. Later he stopped there for two weeks; three weeks at a time, sometimes. He may have walked through the barber-shop, he did that sometimes, walked through the barber-shop. Sometimes he walked through the bar-room. No, he had no recollection of going with Mr. O'Neill and Miss Wade and Miss Gomes in an [221] automobile out to Palo Alto. He had no recollection of sáying to her that "I am a Kaiser man from head to foot." No, he had no recollection of saying to her that "I am a millionaire, and I will spend every cent I have to help Germany win this war." No, he knew he wasn't a millionaire. So he could not spend it. He didn't think he said it. He did not recall having said to her, "I am for Germany, and I am willing to die for Germany at any time." Didn't believe he discussed the Kaiser with her or that he told her the Kaiser was the greatest man in the world, no, sir. He did not discuss President Wilson with her. Nor compare President Wilson with the Kaiser in discussing the matter with her. He never had any war talk in Frisco. He did not discuss the matter of an impending or oncoming revolution in this country, no, sir. He thought Miss Gomes also entered into the conspiracy with these five men on the car, and Mr. Titus, about this revolution story. He thought she entered into a conspiracy with them to misstate the facts about it. He could not say any-

(Testimony of Henry Albers.)

thing about it, whether she conspired before that time with these other gentlemen. He knew he never had any war discussion with that lady at all. And he was positive that he didn't discuss them with her. He thought he was in the barber-shop a couple of times. They never talked about a bank in Frisco. He had some recollection that he talked about Milwaukie. He didn't know when it was. He had been there half a dozen times. He always stops at the Sutter Hotel. He didn't know when it could be. She said the 18th or 19th; he was in Portland on the 18th, he knew that. He had discussed the China pheasants with people; he didn't know with whom. If Miss Gomes says she discussed it with [222] him he might think she was telling the truth about it; he didn't know. He knew he had China pheasants, peacocks and all that kind of stuff down there. She might be telling the truth in those two particulars; he would not say anything about that, of course. He didn't know anything about the discussions concerning the war which she says occurred the same day, and a portion of it at the same time. He left San Francisco on the night of the 7th of October, 1918. Came up on the Oregon Limited, the through train. He met Lot Swetland on the ferry, yes, sir. They walked together from the Mole to the train. He didn't know if he ever did talk to Lot Swetland after. He knew he talked all from the ferry boat across the bay, he remembered that. He had a few drinks before he left San Francisco. He guessed he was sober. He didn't remember when he went to bed; could not say anything about that.

(Testimony of Henry Albers.)

He didn't remember anything about that; he talked with Lot Swetland, while on the car, before he went to bed. If Swetland testified that after he, Swetland, got on the train he saw defendant in the observation-car, defendant thought he might have been there; he didn't know. He could not say anything about Swetland's testimony as to defendant's condition. He didn't remember anything since he got on the train. He could not say anything about whether he thought that Swetland is not telling the truth about that. He didn't know when he got up the next day. He didn't know that he had anything to eat on the train. Didn't recall that. He did not recall being in the small washroom, the smoking room at the end of the observation-car, during the early evening. He wasn't in there at all that he knew of. He never knew any one of these men who have testified they saw [223] him in there and talked to him. He never heard of them, except he heard it before when Mr. Goldstein explained it to him when he was up to his office one time. That was after defendant arrived in Portland. Prior to that time he had never heard of any of these men. He don't know Mr. Watkins, the Special Agent. He didn't recall anybody that he saw in the sleeping-car after he got up that day, didn't remember that he saw anybody. And he didn't recall anything that happened that evening. He got up in Portland next morning, he knew that. He did not recall that clearly, he thought the porter told him to get out. He thought he went home when he got off the car. When he got home he

(Testimony of Henry Albers.)

was all right, he went right to bed, he was kind of sick. His home is out at Milwaukie. He didn't remember any conversation with this Mr. Kinney in the car. He never met Mr. Kinney before. He didn't know that he ever met that man, because he had not got much chance of meeting any of the salesmen. He did not know that he had any discussion with him in that smoking-room that night as they came up after leaving Ashland or Medford, going towards Roseburg. No, he didn't recall saying to him that "Once a German is always a German." He didn't think he ever talked that way. He never said that they can never lick the Kaiser. He could not say what would make him say there would be a revolution in this country, maybe in four years, possibly in two. He didn't know anything about it. He didn't think he ever said anything like that. No, sir, he never made the statement he could take a gun himself and fight right here. Never had a gun in his life. Didn't know anything about telling Mr. Kinney he came here without anything and he could go away without anything. There was [224] no feeling of enmity between Mr. Kinney and himself that he knew of. Of course, he didn't know the man. Didn't know that he ever met the man in his life. Didn't recall telling J. A. Mead, "I am a German, and don't deny it. Once a German always a German." He didn't remember anything that he knew of in the car. He never said, "They never can lick the Kaiser in a thousand years," he didn't think, because he didn't recollect anything on the train. He didn't know any

(Testimony of Henry Albers.)

reason why this man, who didn't know him, should come in and tell an untruth about it. He never met Mr. Bendixen. Never saw the man before he was on the witness-stand. Defendant met his uncle, Peter Bendixen, in Los Angeles, yes, sir. His uncle is a stockholder in defendant's concern, or was. He did not recall any conversation in German or English with Bendixen in the train that night. He did not recall saying to him, "Once a German always a German." He didn't remember anything that he said to Bendixen, or anybody. He never would say, "While I am American on the outside, I am German in heart." Could not. Didn't say, "To hell with America." No, he would never say that word "schlach." "Schlach" does not mean to destroy; no. It means to strike and fire. Yes, knock-out means more than the two words knock and out. It means to finish a thing, to terminate. No, schlach does not have in German the same kind of an extended meaning. It does not mean to strike to the finish, to end to terminate to settle, to obliterate. No, that is schlage, not schlach. No, he never did make either of those expressions to Bendixen. He didn't recall talking to anybody who spoke to him in German in that car that night. He didn't remember anything on the train. It is a blank to him. He didn't [225] remember telling Bendixen that he knew what he was doing after Bendixen made that remark to him. He would never say, "I have helped Germany and I will give all I have to the Kaiser if I have a chance." The Kaiser was never a friend of his. He didn't

(Testimony of Henry Albers.)

remember anybody asking him how he intended to help the Kaiser. He didn't know anything about it. He did not recall making an explanation. He did not recall having said to Bendixen, "I would be willing to go back now and fight for the Kaiser." Or that "We have already won the war." He did not say that. He never said that "There will be a revolution in the United States, probably in four years' time, possibly in two years' time." He never said that. He don't know any reason why Bendixen should have a personal feeling against him to the extent that he would come in and tell an untruth about defendant's having said these things. He had no idea. He didn't recall meeting Mr. Tichenor in the smoking-room. He didn't know Mr. Tichenor. He did not recall anybody there who told him to put up a bottle that was setting at the side of his chair on the floor, or else setting on a bench at his side. He didn't remember that he was in the smoker; he didn't remember that he was even in the smoking-room. He had no idea what time he went to bed that night. No, he didn't know he was in the smoking-room at the time he got up to go to bed. He didn't know how he got to bed. His mind is a perfect blank as to what happened, and is a perfect blank as to what happened when Miss Gomes testified he took the trip to Stanford. He didn't see Wardell at Wheeler. He didn't see him there that he knew of. He didn't meet him. And as far as Mr. Titus is concerned, [226] the only thing defendant could remember saying to him is the discussion that arose at the time they were

(Testimony of Henry Albers.)

negotiating for the coal. They didn't have any war discussion then there. They had war discussion in the early days, maybe some discussion, but he didn't remember. He never said the things to Titus that the United States attorney is asking if he did say to Mr. Titus. He didn't know Franz Bopp. He didn't know no Bopp. Does not know a man by the name of von Brincken. Don't know him at all. And doesn't know Bauer. Never saw him, he thought. Nor von Goltzheim, nor Daniel O'Connell, nor Robert Appellee. Never saw him. Nor Herman Kauffman. No, sir, he never told anybody that he was a German and his brothers were German. He knows the Deutches Haus at San Francisco. Had been there once. Maybe a little while after it was finished. Two or three years ago. They had a kind of show there, He was there once with his brother. It was either after the war, or just before the war started, he could not recollect. He knew he was in there once. We went in a little while, went in the bar, had a drink and went home. He didn't know whether his brother is a member of the organization that meets there. The defendant has never been a member of the organization that met there. He didn't know whether those names that counsel had just read over to him are either officers or frequenters of that organization. Oh, yes, now the United States Attorney has mentioned that one of them was the German Consul in San Francisco, he remembered Bopp. He knew he was German Consul. It was in the paper. Defendant never met the man—never saw him in his life.

(Testimony of Henry Albers.)

Never met any of those men. Defendant is not an associate of those men, no, sir. No, he never said that [227] he was pro-German and his brothers were pro-German. He didn't know whether his brothers belonged to that organization. He knows a man named Voss—Clem Voss. He is foreman in the Del Monte Milling Company, owned by the Albers Brothers Milling Company. Yes, it is one of their smaller plants. That plant is out of existence now. He didn't know whether Clem Voss was a member of this organization that met at the Deutsches Haus. Defendant never put up a cent on the outcome of the war with anybody that he knew of. There was a lot of talk during 1914, '15 and '16 and until the early part of 1917, when they went to get a shave—"I bet you grain will be up to-morrow"; "I bet you this"; "I bet you that." He never put up a cent in his life about the outcome of the war. He never bet with Cushing. He only met Cushing about once, or two or three times a year, maybe. He didn't think he ever asked Cushing to bet with him on this question. He knows Jack Noyes. Never made any bets with him about the outcome of the war, no. He was pretty sure that he never made a bet with Jack Noyes. No, he didn't think—it must be way back, but he didn't remember anything about it. It is so far back that he didn't know that he ever did make a bet with Noyes in the fall of 1914 as to the date when the Germans would arrive in Paris. He might have, he would not say. He would not say that for sure, that he did do it. If he made any bet with Noyes along

(Testimony of Henry Albers.)

that line it might have been favorable to the Germans, with a view of the Germans winning. He didn't know. If he made this bet with Noyes he didn't know whether it was after the invasion of Belgium. He didn't recollect that at all. If he made any bets with Noyes he could not remember whether they were made after Belgium was invaded [228] in 1914. He could not remember that far back. Defendant's concern as started in 1885 down on Front Street, or First Street, was rather a small business for a few years. It picked up and became a pretty good-sized business about 1904,—'05—'03. Bought other mills with it. A substantial part of the start in the business was made in handling grain and hay contracts for the army in the Philippines. It was hay baling and several other things that put the business on its feet. Albers Brothers made money out of every line; they made money in milling. He is not a stockholder in any newspaper. He had some stock in the "Nachrichten." Disposed of that some time ago. Not very long ago, maybe a month ago, three weeks. He knows Kern, the manager of the "Nachrichten." He is business manager. He does not know Ernst Kroner, until recently, the editor. Does not know *a* one of the management up there. Did not know Max Lucke; might have met him; aside from that he did not know him. He would not know him. Defendant never was at a meeting. He had a few shares of stock. He didn't remember what happened to Max Lucke. He knew he was in trouble once, but he didn't know. He knew he was in trouble

(Testimony of Henry Albers.)

about some war measure, he didn't know what it was, never followed it up. Never knew Max Lucke was interned by the Government as a dangerous alien enemy. Never knew he was put in a prison camp. The paper is not defendant's paper. He wasn't a contributor to a single other paper aside from being a subscriber. He did not know the "American Independent," a San Francisco paper. He might have read it when he was there. Didn't know anything about who owned and controlled it. He did not know the "American Independent" was organized, printed [229] and disseminated by Bopp. Didn't know that all that crew of disloyal Germans that were arrested and tried and convicted in connection with those Hindoo affairs in the United States Court in San Francisco was the owner of this paper. Defendant did not contribute a cent to it, and his firm was not a contributor that he knew of. Not a cent that he knew of. He should know if it was, but he don't. His firm was not a contributor to that paper that he knew of.

Thereupon defendant rested.

Testimony of Mrs. Eva T. Bendixen, for the Government (In Rebuttal).

Thereupon Mrs. EVA T. BENDIXEN was called as a witness in rebuttal on behalf of the Government, and having been first duly sworn testified as follows:

That she was the wife of E. C. Bendixen and lives here in Portland. She knows Wesley Nippolt and recalled a visit made to her home by Mr. Nippolt

(Testimony of Mrs. Eva T. Bendixen.)

some time in the early fall of 1918. He had been there a good many times but he wasn't there on the 10th of October. She was sure of that, because Mr. Bendixen was not at home at the time. Mr. Bendixen had been gone for about four weeks or more and came home on the 15th day of October. Shortly after that Mr. Nippolt was at their house. Mr. Nippolt and Mr. Bendixen had a conversation at that time concerning the Albers matter. Mr. Bendixen did not say, "I have fixed my uncle's stock plenty. You know Fred Jacquelin. Tell Jacquelin to get rid of his stock, for it won't be worth much for a great while longer," or words to that effect. He made no such statement. Mr. Bendixen did not make the remark that he trapped Henry Albers. Mr. Bendixen did not say at that time that before he would go into the room where Henry Albers was that he made an agreement with Frank Tichenor, [230] that he could drink as much whiskey as he wanted to without being charged with any criminal offense, nor words to that effect.

Thereupon witness was asked the following question: Q. Now, what conversation was had at that time, if any, between Mr. Nippolt and Mr. Bendixen and yourself concerning the Albers arrest or the Albers case or the charges against him.

Defendant thereupon interposed an objection to said question as follows:

Mr. McGINN.—I object to that, your Honor. That is hearsay testimony brought in here. It is railroaded in here, it has no right here. They have

(Testimony of Mrs. Eva T. Bendixen.)

met the testimony, they have denied it and that is all there is here.

Upon defendant's said objection the Court ruled as follows:

COURT.—As to one of these questions that was asked the witness, she started to explain and was not given a chance to explain after she said the thing did not occur. I think she should have the right to explain it.

Defendant saved and was allowed an exception to the foregoing ruling of the Court.

Thereupon the witness testified in response to said question as follows:

A. Well, the conversation came about regarding the case, and the fact that Henry Albers had made seditious remarks and that Mr. Bendixen had been asked to go in there and find out whether he really was a pro-Hun or not, and in regard to the matter about the drink it came up in this way: That he told Mr. Nippolt just how it came up, that he felt kind of, perhaps, that if Mr. Albers would offer him a drink it would be all [231] right for him to take it; that he felt it was his American duty to go in there, if these remarks had been made, to see if it really was so, but he told Mr. Nippolt—

COURT.—He told that to Mr. Nippolt?

A. Yes, sir, and he told also to Mr. Nippolt that it placed him in a very peculiar position because his uncle was interested in the firm and that his first thought was probably he should wire his uncle and then again he thought it would bring a reflection in

(Testimony of Mrs. Eva T. Bendixen.)
some way or other, that he better leave just everything alone and do his—he made the remark in one way perhaps when he couldn't go to war—

COURT.—Mr. Bendixen has testified to that.

Q. But he made no remarks that he trapped Mr. Albers, but he simply said that as his American duty he would—

Mr. HANEY.—That is all.

On cross-examination the witness testified as follows: Mr. Bendixen did not say that inasmuch as he could not go to war he would do his bit that way. He said that it was destined, maybe, that was the way he was doing his bit in finding out a pro-Hun. She could not recall that Mr. Nippolt came back to her house at a later time. He went to Tacoma the following Sunday after that.

Testimony of J. A. Mead, for the Government (In Rebuttal).

Thereupon J. A. MEAD was called as a witness in rebuttal on behalf of the Government, and having been previously sworn, testified as follows:

When he left Los Angeles to go up to Canada he had a card, or letter, from I. S. Hurst, of Los Angeles, California, who used to be a resident of Portland here. Was in some way connected with Thiel's Detective Agency. Has been for years, he understood. Witness went to Wyoming for Mr. Hurst and his associates in charge [232] of an oil property four years ago, and has been very friendly ever since. At the time witness started on this trip

(Testimony of J. A. Mead.)

it was told to him by some authorities down there that it might be necessary for him to have some special identification when he wanted to come back into the United States from Canada. He then went to Mr. Hurst and requested a letter of introduction from him to the manager of the Thiel Detective Agency at Vancouver, British Columbia. He then wrote—took out one of his own personal cards, a very small card, and wrote in lead pencil on that an introduction to the manager of the Thiel Detective Agency in Vancouver. And witness suggested to him that perhaps a letter would be better. So afterwards he—that day or the next he wrote witness a typewritten letter to Mr. Reddington. Witness has the card with him in his pocket. He didn't remember losing it on the train. It might have lost out of his pocket. He didn't remember anything about anybody finding it and giving it back to him. He had no card or other writing of any detective agency in his possession of any description except this letter. No, sir, he never was in the employ of a detective agency or connected with any detective agency in any manner except this card of introduction in his life, that he remembered of.

Testimony of D. Y. Allison, for the Government (In Rebuttal).

Thereupon D. Y. ALLISON was called as a witness in rebuttal in behalf of the Government, and being first duly sworn, testified as follows:

He lives at Roseburg, Oregon. Has made his

(Testimony of D. Y. Allison.)

home there and here for twenty years. He is a railroad train man, with the Southern Pacific. Has been with the Southern Pacific off and on for twenty years. At present his position with the company is a brakeman on No. 13 and 54. On October 8 he was called on [233] 54 at Ashland. That is his division. He remembered the occasion when he got on the train at that time. He knows the defendant Henry Albers when he sees him. By sight. He has known Mr. Albers by sight and in a business way for a good many years. Witness lived in Portland since 1888, but as to a business way he didn't know Mr. Albers any more than he had seen him in the city here. The train was a little late getting into Ashland. About fifteen minutes late, he should judge. He didn't recall exactly as to what time it was, how late they were. It usually get in there at four o'clock. This time about fifteen or twenty minutes late. Something like that. He never paid no attention to Mr. Albers until he was at Tolo. Witness came back—in getting on the train he came back to the rear of the train to convey the orders, the movement of the train, to the flagman, and on going to the rear, why, he generally looks for the flagman in the smoking-room of the last car, but he didn't find him there. He was outside, back just a ways. Witness looked in there and seen some gentlemen in there and he didn't pay no attention to them. Everybody seemed to be all right and they was talking, so witness delivered the orders to the train man, to the flagman. This was just a little ways out of Ashland.

(Testimony of D. Y. Allison.)

On arriving at Medford he left the rear of the train and goes back to his station at the head of the train. In leaving Medford, why, he goes back to notify the flagman as to the movement of the train as he had before, and of course he had to pass by this drawing-room, the washroom or whatever it is, and then he noticed there was some little loud talking and he just looked in; of course looking in to his left, he just looked in there and he heard that gentleman over there say: [234] "They can't do it—" He considered the man drinking some, but he didn't consider him intoxicated.

On cross-examination the witness testified that the time of day was about five-forty or five forty-five.

Testimony of Fred Haines, for the Government (In Rebuttal).

Thereupon FRED HAINES was called as a witness in rebuttal on behalf of the Government, and being first duly sworn testified as follows:

That he lives in Harney County and conducts a store at Harney. He spent some time at Hot Lake in the fall of 1916, about the middle of September. He was at Hot Lake for five or six days and went from there to the round-up at Pendleton, which commenced, he thought, on the 20th, 21st and 22d of September. He had a conversation with the defendant, Henry Albers, at that time. The defendant told him that he was in Baltimore when the "Deutchland" came in but he didn't say he dined on board the boat. Defendant said he met the Captain, Captain Konin or Koenig, whatever it was, and some of the crew.

Testimony of Horace A. Cushing, for the Government (In Rebuttal).

Thereupon HORACE A. CUSHING was called as a witness in rebuttal on behalf of the Government, and being first duly sworn, testified as follows:

That his name is H. Cushing and is an officer or manager of one of the seed companies here. The Lilly Company. He knows the defendant, Henry Albers. He had a conversation with Mr. Albers in which defendant offered to make a bet with him concerning the outcome of the war. It was shortly after the Germans declared war against France and Great Britain. He offered to bet witness a thousand dollars to fifty cents, and loan witness the fifty cents, that the Kaiser could lick the world.

On cross-examination the witness testified that this occurred shortly after Germany declared war against [235] France and Great Britain. Witness did not know when Germany did declare war against Great Britain. It was shortly after they went in and war was declared between them. He did not know whether Germany ever declared war against Great Britain. It was shortly after they got into the war. Witness is in the seed business. They are not competitors of Albers.

Testimony of John H. Noyes, for the Government (In Rebuttal).

Thereupon JOHN H. NOYES was called as a witness in rebuttal by the Government, and being first duly sworn, testified as follows:

(Testimony of John H. Noyes.)

He lives at 562 Stanton Street, city of Portland. Lived in the city of Portland about six months. Prior to that he was away for a year in Seattle. Prior to that he lived about four years in Seattle. Was connected with the Globe Grain and Milling Company. Not now connected with that concern. Just terminated yesterday. For the last year he was manager of the grain department. He knows the defendant, Henry Albers. Has known him quite a few years, ten years or more. Yes, sir, as he recalled it, he made only two bets with Mr. Albers with respect to the outcome of the war. The first bet was made in November, 1914. It was a bet of ten dollars that the Germans would not be in London in sixty days. Mr. Albers bet that the Germans would be in London in sixty days. Witness knows one other bet that he recalls, that was in December, 1915, that the war would be over April 1, 1916. Mr. Albers said the war would be over April 1, 1916. One of these bets was paid. He didn't know which one. Both of them were for ten dollars. Mr. Albers lost, of course.

Thereupon defendant moved to strike out the testimony of Mr. Noyes and of the witness Cushing for the reason that it is immaterial and an attempt to impeach on [236] an immaterial matter.

The Court thereupon overruled defendant's motion to strike out said testimony, to which ruling of the Court the defendant duly saved and was allowed an exception.

Thereupon the Government rested.

Thereupon defendant moved and requested the Court to direct and instruct the jury to return a verdict herein of not guilty on each count of the indictment, and particularly moved and requested the Court respecting the Third Count of the indictment as follows:

"Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count Three of the indictment."

And defendant particularly moved and requested the Court respecting Count Four of the indictment as follows:

"Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count Four of the indictment."

Thereupon argument of counsel was had upon the requests of defendant for a directed verdict, as aforesaid, at the conclusion of which the Court overruled the motion and requests of defendant for said directed verdict. To said ruling of the Court the defendant duly asked and was allowed an exception by the Court. [237]

Whereupon, following the argument of counsel, the Court instructed the jury as follows:

Instructions of the Court to the Jury.

Gentlemen of the Jury:

I congratulate you that we are nearing the end of a long trial. It has been somewhat tedious, but you have been attentive and alert throughout the trial, and undoubtedly you have gathered a pretty accurate measure of the force and weight of the testi-

mony that has been adduced here.

After hearing the testimony and giving attention to the argument of counsel, it now becomes the duty of the Court to determine all questions of law arising on the admissibility of evidence, and throughout the trial and its instructions to the jury, and it is your duty to accept as law that which the Court states to you as such. It is your duty, however, and your exclusive duty, to find the facts from the evidence, and with your deliberations in so doing I have no right and no intention to interfere.

The defendant here is to be tried just as any other defendant charged with the commission of crime, and it is your duty, and you should perform it without any feeling of bias, passion or prejudice against the defendant, and with no feeling of favor, sympathy or bias in his favor.

All right-minded persons feel, no doubt, a righteous indignation against crimes like murder, burglary, arson, or similar crimes. Yet when one is put on trial in a court of justice charged with such a crime, it is the duty of those called upon to determine his or her innocence or guilt, not to permit feelings of indignation toward the crime to interfere with or prevent a calm, impartial and judicial scrutiny and weighing of the evidence and a determination from the evidence [238] alone, whether the particular defendant is guilty of the crime for which he or she is on trial.

So likewise in this case: The offenses with which the defendant is here charged are such as can be committed only when the United States is at war, and

during a time of war feeling is apt to be and usually is intense. It is only natural that one should have feelings of righteous indignation during a time of war against any and all forms of disloyalty or seditious conduct tending in any way to oppose the cause of one's own country or to favor the cause of the enemies of one's country. Yet it is needless to say a person charged with the violation of this statute is entitled to be tried and found guilty upon the same kind and character of evidence and in accordance with the same rules of law as apply in times of peace and to other kinds of crimes, and not otherwise. He is to be tried and his guilt or innocence determined upon the evidence disclosed here in the courtroom and upon the law as given to you by the Court and uninfluenced by any other consideration or motive.

The offences which it is alleged that the defendant has committed, and for which he is now on trial, were committed, if at all, prior to the time when the armistice was signed between the allies and the central powers. By the signing of the armistice, the war between this country and Germany has practically come to an end, and the causes which prompted the enactment of the Espionage Act—the act under which the indictment against the defendant is drawn—have largely ceased to exist; but these conditions do not abate in the least the reasons that prompt and impel the prosecution of persons who, during the time that this country was at war with Germany, [239] knowingly, wilfully, and unlawfully transgressed the denouncements of the act. So that, whether the war has come practically to an end

or not, guilt, if guilt is imputable for a violation of the act, is as much amenable to the letter and spirit of the act as though the war were still in progress. In other words, the fact that the armistice has been signed, and that in all probability the war between the nations will actually and wholly cease, should not have any more influence with you in determining the guilt or innocence of the defendant than if he had been placed on trial during the vigorous prosecution of the war. He is to be tried, I repeat, and his guilt or innocence determined upon the evidence disclosed here in the courtroom, and upon the law as given to you by the Court, and uninfluenced by any other consideration or motive.

If I seem to speak somewhat in the present, by reason of the fact that the war has practically ceased, and the allegations of the indictment have relation to things said to have taken place prior thereto, you will readily see the occasion for doing so, and will, I trust, not be confused thereby.

The indictment contains seven counts, which charge the defendant with the commission of seven different offenses. Two or more of them may have arisen out of the same state of facts, yet nevertheless are distinct offenses, and must be so considered by you in your inquiry touching the guilt or innocence of the accused.

The first four counts are based upon the Act of Congress approved May 16, 1918, which is an amendment to the original Espionage Act of June 15, 1917; and the last three counts are predicated upon the original act. [240]

The first four offenses are alleged to have been committed on the 8th day of October, 1918. The first is for wilfully causing and attempting to cause, inciting and attempting to incite insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States. The second is for wilfully obstructing and attempting to obstruct the recruiting and enlistment service of the United States. The third for wilfully uttering language intended to incite, provoke and encourage resistance to the United States, and to promote the cause of its enemies; and the fourth by wilfully supporting and favoring the cause of a country with which the United States was then at war, to wit, the Imperial German Government, and opposing the cause of the United States therein, by then and there stating, declaring, debating and agitating, in the presence of L. W. Kinney, L. E. Gamaunt, J. A. Mead, E. C. Bendixen, F. B. Tichenor and others, in language in substance and effect as follows:

1. "I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser [meaning William II, German Emperor] and I would go back to Germany tomorrow."

3. "I came here [meaning the United States] without anything and I can go away without anything."

5. "McAdoo [meaning W. G. McAdoo then and there Secretary of the Treasury of the United States] is a son-of-a-bitch. Why should this Government tell me what to do?"

6. "I am a pro-German; so are my brothers."

7. "A German can never be beaten by a Yank [meaning an American]."

8. "You [meaning the United States] can never lick the Kaiser [meaning William II, German Emperor]—never in a thousand years." [241]

9. "There will be a revolution in this country [meaning the United States] in ten years;—yes, in two—maybe to-morrow."

10. "I could take a gun myself and fight right here [meaning in the United States]."

11. "To hell with America."

12. "I have helped Germany in this war, and I would give every cent I have to defeat the United States."

13. "We [meaning Germany] have won the war."

And then it is alleged that other statements were made too indecent to be repeated here in the record.

In all these four counts it is further alleged that, by making these alleged statements, the defendant intended to do and accomplish the things and purposes that are charged against him.

As I have said, the last three counts namely, 5, 6, and 7, are predicated upon the original Act of Congress of July 15, 1917. The fifth count is for wilfully making and conveying false reports and false statements, with intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies, by stating and declaring, between the first

day of July, 1917 and the first day of May, 1918, in the presence of one N. F. Titus and others, in substance and to the effect as follows:

1. That all reports of the German atrocities (meaning [242] thereby the reports of atrocities then being and having theretofore been committed by Germany in Belgium, France and on the high seas by its military and naval forces, while Germany was then at war with the United States) were lies and nothing but lies.

2. That the United States and the citizens thereof are dominated by the English Press.

3. That the United States Food Administration was organized and managed improperly; was wrong, outrageous and no good.

4. That the United States had no cause to attack Germany.

The sixth count is for wilfully causing and attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, to the injury of the service of the United States, by stating, declaring, debating and agitating between the dates of July 1, 1917 and May 1, 1918, in the presence of one N. F. Titus and others, in substance and to the effect as follows:

1. That all reports of the German atrocities (meaning thereby the reports of the atrocities then being and having theretofore been committed by Germany, in Belgium, France and on the high seas by its military and naval forces, while Germany was then at war with the United States) were lies and nothing but lies.

2. That the United States and the citizens thereof are dominated by the English Press.

3. That the United States Food Administration was organized and managed improperly, was wrong, outrageous and no good.

4. That the United States had no cause to attack Germany.

5. That this country (meaning thereby the United States) could never lick the Kaiser (meaning thereby William II, German Emperor) in a thousand years. [243]

6. That all the institutions of the United States (meaning thereby the Government of the United States) were inferior to the institutions of Germany (meaning thereby the Government of Germany).

7. That the United States was up against a hard proposition when it attacked Germany (meaning thereby that the United States would be unable to defeat Germany in the present war); that the American soldiers were mere amateurs, while the German soldiers were professionals.

8. That he (meaning thereby the said defendant) did not like the institutions of this country; that Germany was a better country to live in, and was a country where people enjoyed life.

9. That he (meaning thereby the said defendant) had lived in Germany twenty-five years, and that he preferred that country to this (meaning the United States).

10. That there was going to be a revolution in the United States, that the people of this country (meaning the United States) were living on a volcano; that something was liable to happen at any time and that the people of this country had better look out.

And the seventh count is for wilfully obstructing the recruiting and enlistment service of the United States, to the injury of the service of the United States, by stating, declaring, debating and agitating, between July 1, 1917 and May 1, 1918, in the presence of one Titus and others, in the substance and to the effect as follows: The language being the same as I have just read you from the sixth count.

And as it pertains to these last three counts, it is also further alleged that the defendant intended to do and accomplish the things charged against him, whereby it is charged that he offended against the several clauses of the [244] statute alluded to.

The defendant has interposed a plea of not guilty to the indictment, and to each of the several counts. This is in legal effect a denial of each and every material allegation contained in each of such counts, and each and every element of each of the offenses charged against him; and casts upon the Government the burden of establishing each and every material allegation and element of each offense charged, to your satisfaction beyond a reasonable doubt, without which the defendant must be acquitted.

Under our constitution, and the universally sanctioned and declared policy of this Government, every person charged with a crime, and while on trial be-

fore a court of justice is presumed to be innocent until his guilt has been established, to the satisfaction of the jury, beyond a reasonable doubt. This presumption is a thing of substance, not to be lightly regarded. It is of evidentiary value, and continues and remains with the accused throughout the trial and until the evidence adduced at the trial has convinced the jury, and satisfied their understanding, of the guilt of the accused, to a moral certainty, or, as otherwise expressed, beyond a reasonable doubt.

The fact that an indictment has been presented by the grand jury against the defendant raises no presumption that he is guilty of any offense. It is not any evidence of guilt whatsoever; nor should it be so considered by you. The grand jury, in presenting an indictment, proceeds *ex parte,* that is, by hearing one side only, namely, that of the Government, and without the presence of the defendant, and does not pass upon the question of his guilt or innocence, but merely [245] hears such evidence as is presented by the Government, and determines therefrom whether or not a sufficient probability of guilt is shown to warrant the defendant being placed on trial before a trial jury. In other words, an indictment is merely a way in which, under our laws, is framed the charge upon which the defendant is brought to trial.

In this connection I will define to you the expression "beyond a reasonable doubt." It has been used frequently in this trial, and will be used further in this charge. It is a term always used in criminal cases, but not easily defined. It means just what it

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In this connection I will define to you the expression "beyond a reasonable doubt." It has been used frequently in this trial, and will be used further in this charge. It is a term always used in criminal cases, but not easily defined. It means just what it

says, namely, a reasonable doubt left in your minds after weighing and scrutinizing the evidence, as to whether or not the defendant is guilty as charged. The evidence, in order to satisfy you beyond a reasonable doubt, must produce in your minds an abiding conviction to a moral certainty such as you would be willing to act upon in the important affairs of life as they concern yourself, that the defendant is guilty. Otherwise a reasonable doubt would yet remain in your minds. If, however, after weighing and scrutinizing the testimony as a whole, giving to each and every part of it its proper weight and credit, you reach an abiding conviction to a moral certainty of the defendant's guilt, such as you would be willing to act upon in vital and important affairs of life as they concern yourself, then it cannot be said that you entertain any longer a reasonable doubt, and it would, in that event, be your duty to find a verdict of guilty. If, however, there is any reasonable hypothesis or theory of the evidence which is more [246] consistent with innocence than with guilt, then it is your duty to adopt it and to act upon the hypothesis of innocence rather than of *b*uilt, because only in that way can you uphold and give to the defendant, as the law requires, the benefit of all reasonable doubt. As long as there exists in your mind a reasonable hypothesis or theory of the evidence consistent with innocence rather than guilt, it cannot truly be said that you have reached a conviction beyond a reasonable doubt of guilt. At the same time it is proper, that I should say to you that a reasonable doubt does not, by its terms, exclude all possibility of error or

mistake. It means more than the greater weight of probabilities, but it does not imply the absence of the possibility of error or mistake. Absolute certainty is difficult if not impossible of attainment in any of the affairs of life where the exact sciences or mathematics are not involved. Therefore a mere captious doubt, a speculative doubt, a doubt conjured up by the ingenuity of counsel, a doubt suggested to you by reason of unwillingness on your part to convict, due to feelings of mercy or sympathy, cannot in law be said to be a reasonable doubt.

In brief, a reasonable doubt is one which exists or arises out of the insufficiency of evidence or lack of evidence to produce in your minds that abiding conviction to a moral certainty of guilt, of which I have already spoken. These rules apply in this case, and the defendant is entitled to the benefit of them, namely, he is, notwithstanding the presentation of an indictment, presumed to be innocent; and this presumption is evidence in his favor and remains with him [247] throughout the trial until it is overcome by evidence that satisfies you beyond a reasonable doubt.

Now, bearing in mind my caution and these general instructions, I will define to you the essential elements pertaining to each of the offenses charged as contained in each of the seven counts of the indictment. In the same connection, I will define to you the law governing in criminal prosecutions, which you will apply in your deliberations, and thus you will be enabled, in the light of all the evidence adduced at the trial, to determine what your verdict

shall be as to each and all of these seven counts.

Each count, as I have previously indicated, sets forth a distinct and separate offense, and calls for a distinct and separate consideration by you. The first four counts involve the same act or series of acts on the part of the defendant; that is, they are all based upon the same alleged utterances, alleged to have been made on the 8th day of October, 1918, on a Southern Pacific Railroad train, between Grants Pass and Roseburg, in the State of Oregon. However, they involve four different applications and interpretations of the same transaction. The grand jury, in formulating this indictment, has stated the situation to meet the several offenses thus denounced by the statute, leaving it ultimately to your judgment to determine whether an offense has been committed under any or all such charges under the evidence produced before you.

Of the last three counts, the fifth involves, perhaps, a separate transaction, and the sixth and seventh are predicated upon the same alleged statements or utterances [248] and are also to be separately considered by you. Therefore, you may find the defendant guilty upon all the counts, or not guilty upon all the counts; guilt upon one or more counts, and not guilty upon the balance, according as you may view the evidence under the law as declared by the Court. You may disagree as to one or more counts, and find a verdict as to others, although I hope you will be able to find a verdict upon each and all the counts.

As to the dates upon which it is alleged that the

several offenses were committed, I instruct you that it is not essential that they be proven exactly as alleged, or as laid in the indictment. It is only necessary that the time of doing the act or committing the offense charged be proven approximately as stated in the indictment. Indeed, it is sufficient that the time of commission be established at any date subsequent to the adoption of the acts of Congress under which the respective counts were preferred, and the finding of the indictment by the grand jury, namely, November 2, 1918. The first four counts, I repeat to you, were drawn under the amendatory Act of Congress approved May 16, 1918, and the last three counts under the original Espionage Act approved July 15, 1917.

The acts of Congress under which the several counts of the indictment are framed, are among a number of statutes commonly known as war statutes, enacted in war times, and to meet and serve war conditions and purposes. Obviously, they were enacted to meet the war danger to the Government—dangers arising within the body of the people in the home land rather than dangers from the enemy on the battle line; and the importance of this legislation lies in the fact it embodies the [249] policy which the Government has adopted for its protection against internal interference with its military operations and war program.

All of the provisions of the section of the statute upon which the indictments in the case are based have reference to war activities and war measures of the United States, or to the conduct intended to pro-

mote the success or cause of its enemies in the war, so that utterances concerning the war which are not intended to and do not interfere with or affect in any way the war activities or war measures of the United States and do not promote the success or cause of its enemies do not violate the statute.

The statute does not punish or attempt to punish beliefs. It does not punish sympathy. It does not punish opinions merely as such unless spoken with the purpose of hindering the Government in its war activities. It is lawful for an alien subject of the Imperial Government of Germany to abide and live in the United States if he obeys and observes its laws, rules and regulations, notwithstanding this law; and, while we are at war with Germany, without committing any offense under the provisions of this law, he may continue to hold his beliefs, sympathies or opinions, if he is not wilfully outspoken about them.

The defendant is not on trial here for being of German ancestry or in sympathy with the German Government, so far as that is concerned, or the German cause, and out of sympathy with the United States Government. That is not made punishable unless he gives utterance thereto with the wilful intent that I will explain to you hereafter. He is not on trial for having criticized the American Government or the officers of the American Government or the conduct of the war. There is no law in the United States [250] that punishes a man for his fair criticism of the conduct of the war or of the officials of the Government unless it was done with the purpose and intent that I will tell you of hereafter.

In other words, a man had and now has a right to criticise the Secretary of the Treasury or the Food Administrator, or the Departments of which they are the heads, if he does it with no intent to interfere with the Government in its military measures or activities.

In your deliberations in this cause, the first question you will be naturally called upon to consider is whether the defendant did in fact utter or give voice, at the times and places specified in the indictment, to the words or language in substance and effect like those set out in each of the seven counts. It is not essential that the Government prove the exact words set out in the indictment, and which I have heretofore quoted to you; but it must prove that the words uttered by the defendant were in all respects similar in substance and effect. In determining that question, you have no concern with the question of whether or not on that occasion he uttered other words substantially different from those imputed to him, even though such other words might in your opinion have a tendency to accomplish some one or more of the purposes set out in the various counts of the indictment, and even though you might believe that the defendant intended in uttering them to accomplish such purpose. The defendant is not accused of uttering words other than those stated in the indictment, and presumably he is not prepared to meet such accusations. Neither would a conviction or acquittal in this [251] case afford him any protection against a second prosecution for uttering other and different words than those set out. So

that if you do not believe beyond a reasonable doubt that at the time and place specified in the indictment the defendant uttered the words imputed to him, or words similar in substance and effect, or if you have a reasonable doubt upon that question it will be your duty to return a verdict of not guilty, without even considering any other issue in the case.

In this connection I wish to say to you that if you find beyond a reasonable doubt that the defendant did in fact utter the words imputed to him in the indictment or words in substance and effect like them, in determining what his purpose and intent was in so doing, you will have a right to consider what would be the natural, usual and necessary consequences of uttering such words at the time and place and in the presence and hearing of the people referred to in the indictment. You will bear in mind that the question in each case is, What did the defendant actually intend in uttering the words imputed to him, if he uttered them at all? There is no presumption which is conclusive, either in law or in fact, that he actually intended what may appear to you to be the natural, usual and necessary consequences of uttering such words, and you will consider this matter in connection with all the other evidence in the case for the purpose of determining what was in fact the defendant's actual purpose and intent. And upon the question of intent I shall have something more to say to you.

The first count in the indictment is based upon that provision of the law which declares that whoever, when the United States is at war, shall wilfully

cause or attempt to cause, or incite or attempt to incite insubordination, disloyalty, [252] mutiny or refusal of duty in the military or naval forces of the United States, shall be guilty of a crime. The words "when the United States is at war" are set forth in each count of the indictment, and that constitutes an element of the offense. But I instruct you, as a matter of law and as a fact that is known to everyone, that during the times stated in the indictment, and all of them, the United States was then at war with the Imperial Government of Germany, and hence you will have nothing further to determine as to that. Under this count, the questions for your determination are: (1) Did the defendant utter the words imputed to him, either literally or in substance and effect; (2) If he did, was the natural or reasonable or probable tendency of such utterances to bring about or produce disloyalty or refusal of duty in the military forces of the United States; and (3) Was it his intention to wilfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States? If he made the statements imputed to him with the intent charged, it is not necessary that the Government should satisfy you that he was successful in producing disloyalty, insubordination, mutiny, or refusal of duty in the military or naval forces of the United States. Indeed, the words uttered may, in your opinion, have entirely failed to produce any such effect. On the contrary, you may believe that they have a contrary effect; that those to whom they

were addressed were rather stimulated in their loyalty than otherwise. The guilt or innocence of the defendant does not depend upon the success or want of success of the attempt, if he was [253] guilty of an attempt to cause insubordination, disloyalty or mutiny in the naval or military forces of the United States. You may feel satisfied that nothing that the defendant said or did had any effect to cause insubordination, and yet, if you believe that he made disobedience on the part of a person in the military the statements attributed to him in an attempt to do that, he would be guilty as charged in this count of the indictment.

And in this connection, insubordination means disobedience on the part of a person in the military or naval forces of the United States to the commands of officers, and the failure on the part of such person to abide by and conform to the rules, laws and regulations enacted and put in force for the government of the military and naval forces of the United States.

Disloyalty means lack of loyalty or fidelity; violation of allegiance; the doing of a disloyal act, the object of which is to hinder the objects and purposes of the Government in recruiting and enlisting soldiers for the military and naval forces.

Mutiny means revolt or rebellion or refusal to discharge a duty and to obey the orders of the constituted authorities of the military and naval forces of the United States.

Refusal of duty means refusal to comply with the rules and regulations relating to the military and

naval forces of the United States; or relating to the organization of the army or the navy of the United States; or relating to carrying on the war against Germany. [254]

There are many different ways in which this particular section may be violated, and many different grades of moral turpitude in doing it; that is, in attempting to or trying wilfully to cause insubordination in the forces that the United States had and was preparing in the war. It is not claimed that the defendant actually brought about any insubordination or refusal of duty; it is not claimed he brought about any disloyalty. The charge is, that is what he had in his heart—that it was his purpose and he tried to bring it about, and these words that the Government claims he spoke, were spoken, it is claimed, for that purpose; and that is what you have to decide.

Nor is it necessary that the Government should prove that the statements attributed to the defendant were made in the presence of persons liable to military service. It is sufficient if you find that such statements were wilfully made, with the knowledge that they might be reported to and reach the ears of persons in the military and naval forces of the United States, or liable to be called to the service under the selective act, and that they were made for that purpose, and with intent thereby to cause insubordination, disloyalty, mutiny or refusal of duty.

The question under this count is, if you believe that the language was spoken by him as charged in the indictment, what effect did he intend that such language should have upon those hearing it? Again,

I repeat, it is not necessary that the Government should prove that the words of the defendant actually caused insubordination, mutiny, disloyalty or refusal of duty. To so hold would be to defeat the whole purpose of the statute, for the purpose of the law as a whole [255] was not to wait and see if the seed of insubordination at a later date in some camp sprang into life and brought forth fruit, but it was to prevent the seed being sown initially. And moreover it is the purpose of this statute to enable the civil courts to prevent the sewing of the seeds of disloyalty; for, as to the fruits of disloyalty, through which a misguided soldier might be led by the disloyal advice, the military court martial already provided was sufficient. The statute was not addressed to the misguided man in the service, but was manifestly intended to include anyone who in any way wilfully created or attempted to cause or incite insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States.

The military forces of the United States as defined in this provision of the act and of the law are not limited to those actually enlisted and enrolled in the active, organized military forces. Such forces include also all male persons who are citizens of the United States, or who have declared their intention to become citizens of this country, between the ages of 18 and 45 years, who fall within the draft act of May 18, 1917, and the amendment thereto of August 31, 1918, and who have registered and have been classified, but have not yet been called into service. For the purposes of this act and this trial, I say to

you that all such persons thus registered and enrolled, and thus subject from time to time to be called into the active service, are a part of the military forces of the United States; and causing or attempting to cause, or inciting or attempting to incite disloyalty, insubordination, mutiny, or refusal of duty among them, or any of [256] them, will be sufficient to constitute the crime charged under this count. Nor is it necessary that the language spoken or uttered be addressed directly to one of the organized forces, or subject to the selective draft. It is sufficient that the language is calculated, by import and expression, to take hold somewhere, and that eventually it will have its impress in causing or inciting disloyalty or insubordination in the military forces of the United States, as I have defined them to you.

The second count of the indictment is the next one you will be called upon to consider. It is based upon that provision of the law which declares that whoever, when the United States is at war, shall wilfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States shall be guilty of a crime.

The elements of this offense as charged are: (1) That the declarations and statements alleged to have been made by the defendant, or declarations and statements in substance and effect as those imputed to the defendant, must have been wilfully made by him at the time and under the circumstances alleged; (2) if he made such declarations and statements, or in substance and effect, that

their natural or reasonable or probable tendency and effect were to obstruct or constituted an attempt to obstruct the recruiting and enlistment service of the United States; and (3), that it was his intention to obstruct or attempt to obstruct the recruiting and enlistment service of the United States, or to bring about that result. It is not essential that he should have actually brought about such result, but it is sufficient that he intended to accomplish, in some measure, [257] the thing thus denounced by the law.

This statute is applicable, of course, only when the United States is at war. At such time the Government is chiefly interested in procuring men for the army and navy. It may at the outset, therefore, be safely assumed that the evil which Congress had in mind in enacting this statute, and which it wished to prevent, was the placing of obstacles in the way of raising an adequate army and navy, which was then an urgent and pressing necessity, and that it was not concerned with the means which might be devised to obstruct the recruiting or enlistment. The word "obstruct" is broad. It is defined as synonymous with "impede, retard, embarrass, oppose, to be or come in the way of, to hinder from passing, action or operation; to stop, impede, retard"; and such has been the construction generally given to it when it has been used in other federal statutes. It thus follows that whatever hinders or embarrasses the recruiting or enlistment service would also obstruct it. It is not necessary that the obstruction should be a physical one. It is clear that the enlistment or recruiting service would be quite as much obstructed and the

United States as severely injured by inducing eligible persons through public addresses, persuasion or any kindred means not to enlist, as by assault upon a recruiting officer, or demolishment of a building in which a recruiting office is located, or tearing down or defacing recruiting posters or by actually intimidating recruits.

In other words, this provision of the act does not mean alone physical acts by which men shall be prevailed upon not to take the steps which their country requires them to take, or desires them to take. It does not mean, nor is it confined to going out and carrying on a campaign from house to house to dissuade from enlistment, [258] or from performing their duty under the selective act.

Nor is it necessary for the Government in order to make out a violation of this law, to go out in a community and find men who will testify that they were dissuaded by some act of the defendant or some word of his from performing their duty to their country under the law. That is not required. All that is required is that the defendant shall have used the language which is attributed to him, and which, taken in connection with the occasion upon which it was used, would naturally result in bringing about the thing which the law says shall not be done.

The provision of the statute under which this count is framed, not only applies to voluntary enlistment but also embraces all persons subject to the provisions of the Selective Service Act. It was intended by this law to prohibit the wilful obstruction of the Government in its efforts to raise an army to effectively deal

with the crisis which then concerned the country, whether it be directly against voluntary enlistment or the draft.

As to the matter of obstruction there are many ways that could occur in which enlistment and recruiting service of the United States could be obstructed or impeded. It does not have to be stopped. The statute does not mean that the obstruction must be extended to the point of actually stopping the whole service; it might be obstructed by taking the registration list and destroying it, by persuading some man to flee the country or to resist being put in the service; it might extend only to one man, but that would be an obstruction. So that obstruction in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent in whole or in part. As used in this indictment, it [259] means active antagonism to the enforcement of the Act of Congress, that is, to effectively resist or oppose the commands of the law to the injury of the service, or by actual words intentionally to cause others to do so; to interfere or intermeddle in such a way and to such an extent as to render more burdensome or difficult the enforcement or execution of the law to the injury of the service.

If the natural and reasonable effect of what is said is to obstruct or to attempt to obstruct the recruiting and enlistment service, and the words are used in an endeavor to do so, it is immaterial that the duty to resist is not mentioned or the interest of the persons addressed is not suggested. That one may willfully obstruct the enlistment service without voicing

any direct language against enlistment and without stating that to refrain from enlistment is a duty or in one's interest, seems too plain for controversy.

To obstruct may be accomplished by raising an obstacle, a mental obstacle in the mind of the person to whom the remarks were addressed such as to cause him to pause and hesitate even though he might finally overcome it and not be prevented from enlisting. But if the remarks are such that they are reasonably and naturally calculated to cause the person to whom they are addressed to be impeded and retarded in his willingness to offer himself as an enlisted soldier and were so intended and the effect of the remarks is to cause such a person to pause and be delayed in reaching a decision, then it would be sufficient for a violation of the statute.

With reference to the attempt to obstruct the recruiting or enlistment service of the United States or the [260] intent to cause insubordination, mutiny and refusal of duty among the naval and military forces of the United States, the truth or falsity of any statement that the defendant might make in connection with what he did or in an attempt or with an intent on his part to cause insubordination, makes no difference whatsoever. In other words, if you find that the defendant willfully caused or attempted to cause insubordination or willfully attempted to obstruct the recruiting service, then it does not make any difference whether or not the statements which you may find he made were true or false, because, whether they were false or whether they were expressions of opinion, is absolutely immaterial in so

far as that part of the act is concerned, so long as they resulted in his willfully causing or attempting to cause insubordination, or wilfully causing or attempting to obstruct the service.

In determining what was the natural and ordinary result of the language used by the defendant in the manner in which he used it and in the connection with which he used it, you have to take into consideration what are matters of common knowledge; that men must go from home, and fathers and mothers must make the sacrifice; that men who enlist are often influenced, more or less, by the wishes of their parents, and they are influenced, more or less, by their view of the conditions that they are entertaining. Take all these things into consideration, then take the language used, if you find it was used, and determine whether or not his purpose or intent was to interfere with men whose minds might be guiding them to enlist, or to interfere with those who might have influence or domination over them, or control over them; in other words, from a practical standpoint, [261] whether or not it would interfere naturally with the number of enlistments or the number recruited by the Recruiting Office. It is not necessary, of course, or not practicable that the Government should show that some person was induced not to enlist by reason of the things charged to have been said. It is sufficient if the things said were said with that purpose and that they were in their nature such as ordinarily would bring about that result. Then the evidence is complete.

Having defined these offenses so denounced by the

statute, you will appreciate how essential it was to the successful prosecution of the war that none of these evils should possess the men of the country subject to draft, and that no obstructions should be imposed in any way to impede, retard, hinder, or make it harder or more difficult for the Government to recruit and enlist men in the military service. Hence, there was great and wholesome reason for this statute, and the reason for its rigid enforcement was just as potent. Nothing should interfere with the military and naval forces nor with the work of recruiting and enlisting men to go to make up such forces. Any means employed to cause these evils is denounced and subject to punishment.

The third count of the indictment is based on that provision of the law which declares that, who*ever*, when the United States is at war, shall wilfully utter or publish any language intended to incite, provoke or encourage resistance to the United States or promote the cause of its enemies, shall be guilty of a crime. It is charged in the third count that by the use of the language imputed to him [262] the defendant thereby intended to provoke and encourage resistance to the United States, and to promote the cause of its enemies.

The elements of this offense, each of which the Government must establish by the evidence beyond a reasonable doubt, are: That the defendant wilfully uttered or published certain language; that the language thus uttered or published was intended either to incite or provoke or encourage resistance to the United States or to promote the cause of its enemies;

that the language uttered in the indictment, or the substance thereof, must be found by you beyond a reasonable doubt to have been so uttered and published. And you must also find beyond a reasonable doubt that the language as uttered and published was such that the natural or reasonable and probable tendency and effect thereof would be to incite, provoke or encourage resistance to the United States or promote the cause of its enemies; and finally that the defendant, in uttering or publishing such language, did so wilfully and with the specific criminal intent either to incite, provoke or encourage resistance to the United States or to promote the cause of its enemies. Each and all of these elements, as I have said, must be proved by the Government beyond a reasonable doubt; otherwise the defendant should be found not guilty.

Now, it is for you to say whether or not the Government has proved beyond a reasonable doubt the utterance by the defendant of the language charged in this indictment, or the substance thereof, whether or not that language so uttered or published was intended to incite, provoke or encourage [263] resistance to the United States or to promote the cause of its enemies, or whether the natural or reasonable and probable tendency and effect of the language was either to incite or encourage resistance to the United States or to promote the cause of its enemies. And it is also for you to say whether or not it was uttered wilfully and with the specific criminal intent.

It is proper that I should instruct you as to what is meant by resistance to the United States as used

in this law and in this charge. The other words in the law and in the charge are plain and were used and have been used in my opinion in the ordinary, every day, common sense meaning.

Resistance, as a proposition of law means to oppose by direct, active and *quasi*-forcible means the United States, that is the laws of the United States and the measures taken under and in conformity with those laws to carry on and prosecute to a successful end the war in which the United States was then and is now engaged. Resistance means more than mere opposition or indifference to the United States or to its success in the war. It means more than inciting, provoking or encouraging refusal of duty, or obstructing or attempting to obstruct the United States. The element of direct, active opposition by *quasi*-forcible means is required to constitute the offense of resisting the United States under this provision of the law and under this charge of the indictment. The offense, however, may be committed by wilfully and intentionally uttering language intended to promote the cause of the enemies of the United States without necessarily inciting, provoking or encouraging forcible [264] resistance to the United States. To promote means to help, to give aid, assistance to the enemies of the United States in the waging of the war. The cause of the enemies of the United States means any and all of their military measures taken or carried on for the purpose of winning the war as against the United States. The cause of the United States as used in this act does not mean the reason which induced the

Congress of the United States to declare a state of war between the United States and the Imperial Government of Germany. It does not mean the aims of the war in the sense of the terms of peace to be imposed or the results to be accomplished or the time and conditions under which it is to be brought to a termination. In plain language, it means the side of the United States in the present impending and pending struggle. The words "oppose" and "cause" should be weighed and considered by you as limited to opposing or opposition to such military measures as are taken by the United States under lawful authority for the purpose of prosecuting that war to a successful and victorious determination.

The law does not forbid differences of opinion or reasonable discussion as to the causes which induced Congress to declare war or as to the results to be attained by war, or at the end of the war, nor the time and conditons under which the war should be brought to an end, nor any reasonable and temperate discussions and differences of opinion upon any or all of the measures or policies adopted in carrying on the war. The law is limited to making it a crime to oppose by word or act the military measures taken by the United States or under lawful authority by the officers of the United States for the purpose of prosecuting that war to a successful end. [265]

The fourth count of the indictment is based on that provision of the law which declares that "Whoever shall by word or act, support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the

United States therein" shall be guilty of an offense.

It is charged by this count, that, by the use of the language imputed to the defendant in the indictment, the defendant thereby intended to support or favor the cause of the Imperial Government of Germany and to oppose the cause of the United States in the present war. The elements of this offense each of which the Government must establish by the evidence beyond a reasonable doubt, are: First, that the defendant wilfully uttered or published certain language; that the language thus uttered or published was intended either to support or favor the cause of the Imperial Government of Germany, a government with which the United States was at war, or to oppose the cause of the United States therein, namely, in such war; that the language uttered as set forth in the indictment, or the substance thereof, or some substantial part thereof, must be found by you, beyond a reasonable doubt, to have been so uttered and published. And you must also find beyond a reasonable doubt that the language as uttered and published was such that the natural or reasonable and probable tendency and effect thereof would be to support or favor the cause of the Imperial Government of Germany in the present war as against the United States, and to oppose the cause of the United States in such war; and finally that defendant, in uttering or publishing such language did so wilfully, and with the specific criminal intent either to support or favor the cause of the Imperial Government of Germany in the [266] present war against the United States, or to oppose

the cause of the United States in such war. Each and all of these elements, as I have said, must be proved by the Government beyond a reasonable doubt; otherwise the defendant should be found not guilty.

Now, it is for you to say whether or not the Government has proved, beyond a reasonable doubt, the utterance and publication by the defendant of the language charged in the indictment, or the substance thereof, or some substantial part of the same; whether or not that language so uttered or published was intended by the defendant to support or to favor the cause of the Imperial Government of Germany as against the United States in the present war, or to oppose the cause of the United States in such war; and whether the natural or reasonable and probable tendency and effect of the language was either to support or to favor the cause of the Imperial German Government as against the United States in this war, or to oppose the cause of the United States therein. And it is for you to say whether or not the language so imputed to the defendant was uttered wilfully and with the specific criminal intent.

You will note the language of the act: "Whoever by word or act shall support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States in such war." The charge is that the defendant, by the use of the language imputed to him in the indictment, did support and favor the cause of Germany in the present war, and did oppose the cause of the United States therein. It is the supporting

or favoring of the cause of the German Government in the war, and the opposing of the cause of this Government in the war that [267] the statute denounces. The method of supporting or favoring the one cause and opposing the other is declared to be by word or act. When this Government declared war upon Germany it had a cause for so doing, which was stated at the time. The German Government challenged the issue, and at once entered upon war against this Government, if it had not in reality been engaged in such a war previously, and it is the policy and edict of the law that no person within the confines of the United States shall support or favor the German side of the cause of war for which this Government is or was fighting, or oppose the American side. The meaning or signification of the words "support or favor" is plain, and they need no other definition or explanation for your comprehension or understanding. I may say they mean to lend assistance to, or to aid or give countenance to, or to espouse the cause upon the one side, that is, the side of the German Government. So of the word "oppose." Its significance is also plain and easily understood. It simply signifies to resist, combat, strive against, to set one's face against, make a stand against.

The intention of the law is that to support or favor, or to oppose, must be something more than a merely passive operation. The word or act must be something active, lending support to or favoring the cause or the side of Germany, or opposing the cause or the side of the United States. It must be of the nature that the effort will lead to the conviction that

the accused really, by word or act, supported or favored the cause of Germany as against the United States in the war, or opposed the cause of the United States therein. The offense, therefore, might be committed by wilfully and intentionally uttering language **[268]** designed to support or favor the cause of Germany as against the United States, or to oppose the cause of the United States in the war with that country, and which language so uttered, by its natural import and meaning, has that effect, and this may be accomplished without encouraging forcible resistance to the United States. In other words, the statute does not denounce the mere harboring of views which support or favor the German cause, or oppose the cause of this country, but it does denounce the utterance of such views, and any attempt to avow them in discussion with others, or the assertion thereof in the presence of another or others, because of the effect such avowal or assertion might have upon the acts and demeanor of others, affecting their loyalty and patriotism towards this Government.

The "cause of the United States" as used in the act does not mean the reason which induced the Congress of the United States to declare a state of war between the United States and Germany. It does not mean the aims of the war in the sense of the terms of peace to be imposed, or the results to be accomplished, or the time and conditions under which it is to be brought to a termination. In plain language, it means the side of the one Government or the other, as previously expressed, in the present im-

pending and pending struggle, or that which was impending or pending.

The law, I repeat, does not forbid differences of opinion or reasonable discussion as to causes which induced Congress to declare war, or as to the results to be attained by war, or at the end of the war, nor the time and conditions under which the war should be brought to an end, nor any reasonable and temperate discussion and differences of opinion upon any or all of the measures or policies adopted in carrying **[269]** on the war. Nor does it forbid reasonable discussion of the causes of the opposing governments in this war, for this is one of the means by which the people inform themselves touching the subject. It is the openly espousing the cause of Germany by utterances or acts lending support or favoring the cause of that country, or by like method opposing the cause of this country in the war that the statute forbids and denounces.

If the defendant wilfully uttered the language imputed to him, substantially and in effect as set forth in the indictment, with the intent and purpose of supporting or favoring the cause of Germany in the war, or opposing the cause of the United States therein, and the natural or reasonable and probable tendency and effect of the words and language so spoken and uttered is to that effect, interpreted by the attending circumstances and demeanor of the defendant, then the defendant would be guilty; otherwise, he should be acquitted on this charge.

Count five is predicated upon the original Espionage Act, and on that portion thereof which declares

that whoever, when the United States is at war, shall wilfully make or convey false reports or false statements, with the intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, shall be guilty of an offense. The elements of this offense to be established are: (1), that the defendant must have wilfully made the reports or false statements imputed to him in the indictment in substance and effect as alleged, or some substantial part thereof; (2), that such reports or statements were false, and known to the defendant to be false; and, (3), that he made the same with **[270]** the intent and purpose of interfering with the operation or success of the military or naval forces of the United States, or to promote. the success of its enemies The wilful intent is important, and you must find beyond a reasonable doubt, not only that he made and conveyed false reports and false statements, knowing them to be false, but that he made or conveyed them with the specific, wilful intent thereby to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies.

The term "military forces" as defined in this provision of the original act and of the law is not limited to those actually enlisted and enrolled in the active organized military forces. The act of May 18, 1917, providing for the creation of an active army for the purpose of carrying on this war, required that all male persons between the ages of 21 and 30, both inclusive, should enroll or register for military ser-

vice, and it is from the men thus registered, excluding aliens who have not declared an intention to become citizens, that contingents of men were from time to time called into the active military forces of the United States. For the purpose of this act and of this trial you are advised that all such persons thus registered and enrolled and thus subject from time to time to be called into the active service are a part of the military forces of the United States. Any interference by the means thus denounced with the operation or success of said forces comes within the purview of the statute.

What is an intent to interfere with the operation or success of the army or navy of the United States? A statement that was made with the intent to interfere with [271] the operation in the field of the troops, with the movements of the armies, with the supply of their munitions, their food, their equipment, would quite readily, to your minds, be a statement made with the intent to interfere with the operation or success of the troops. But the statute is not limited to a direct interference with troop movements or with the armies in uniform or with their military maneuvers. Anything that interferes with the operation or success of the army or navy, if it is a false statement, made as this statute sets out, is denounced the same as if it directly interfered with the movement of an army going into battle. It is necessary in order that the armies may operate and be successful not only that they have the proper support and management in the field, but it is necessary that at home they should be supported by

money, by taxation, and by the spirit of the people. The army and navy could not successfully operate nor succeed if we should refuse them money, or if we should fail to send them material resources, or if the country should manifest such a spirit of indifference and failure to support the army and navy in their work that there would be no effective backing for them such as the nation must always give to its armies in the field.

So the operation and success of the army and navy may be interfered with by the failure to raise funds for their efficient support and the like. Whatever chills or retards the support of the war by the people of the nation at home also tends to defeat the operation and success of the army and navy in its actions on the field of battle.

And so if you find that the defendant in what he said (if you find that he said the things in substance and effect as imputed to him by the indictment, and that they were [272] false), did so with the intent that his hearers should be retarded in their support of the army and navy to any extent, and that they should thereby, and as a consequence of what he said, diminish their effective support of the Government, such as by subscribing to the bonds, or the war-savings stamps, or whatever method of giving their money to the Government was necessary to support the army and navy in its operations, then you can find that what he said was with the intent that it should interfere with the operation and success of the military and naval forces of the United States.

Count six is based upon that provision of the

original Espionage Act which makes it unlawful for anyone to wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States. This provision of the law was re-enacted in the amendment to the Espionage Act without any change except the words "incite or attempt to incite" are omitted, and the instructions I have already given you on this provision of the law under count one are applicable here. The essential difference between counts two and six is with respect to the statements alleged to have been uttered, the times at which they were uttered, and the persons present when they were uttered. You will therefore have in mind the instructions I have given you pertaining to count one in your consideration of the testimony as it relates to the guilt or innocence of the defendant under this charge of the indictment.

Count seven is based upon that portion of the original Espionage Act which makes it unlawful for anyone to wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service of the United [273] States. This was changed in the amended Espionage Act by including the words "and attempt to obstruct" and by omitting the words "to the injury of the service of the United States." So far as the words "to the injury of the service of the United States are concerned, they do not change the intendment of the act, for whatever has the effect of obstructing the recruiting or enlistment service of the United States works to the injury and damage of the Government. The necessary and

logical effect and sequence of the act of retarding or making it harder or more difficult for the Government to act and carry forward the work of recruiting or enlistment is to work injury and damage to the Government. No other or more specific injury to the United States is necessary or required to be shown.

What I have already said concerning this provision of the law as amended, upon which count two was based, could be repeated here with reference to count seven, for even under this statute, prior to its amendment, it was not necessary to show that any one was actually obstructed from enlisting, although that would be one method in which the enlistment service could be shown to be obstructed. The enlistment service embraces a number of agencies. In the first place the law allows enlistment. There is an army in which they can enlist at any time there was a war in which we were engaged, in which enlistments were desired in the army and navy. There were recruiting and enlistment offices provided. All of these agencies were a part of the recruiting and enlistment service of the United States, but it embraces more; in addition to these methods by which a man could get into the service, there was the service of appeal to enter the service by means of advertisements authorized by the [274] Government, by appeals to men's patriotism; to the love of their country to whatever would induce a man within the enlistment age to offer himself as a soldier in the army or navy of the United States. The enlistment service of the United States embraced whatever agency legiti-

mately appealed to a man within the proper ages, to offer himself as a soldier or sailor of the United States. When Congress said that no one shall wilfully obstruct the recruiting and enlistment service, it meant that the entire service should be free from obstruction, and by obstruction it meant it should be free from hindrance, embarrassment or delay as well as effective opposition.

Now, referring to counts one, two, three and four, there are two other matters concerning which I should instruct you. The defendant claims, first, that F. B. Tichenor, a deputy United States marshal, and L. E. Gamaunt, a deputy sheriff of a county in the State of Washington, induced and incited, or lured the defendant on to make the statements charged against him in these four counts, and therefore he ought not to be held amenable to the law; and, second, that the defendant was so intoxicated at the time that he was not mentally capable of deliberation or of forming or harboring an intent to do the things he is charged with doing by these first four counts in the indictment.

As to the first of these contentions, I instruct you that the policy of the law will not, and does not, uphold or sustain a conviction where the defendant has been incited or induced or has been lured by the officers of the law to commit the crime for which he has been indicted and is being tried. Officers of the law are [275] required, and are bound by good conscience, to be just to their constituency, as well as alert in detecting and ferreting out the commission of crime, and discovering the perpetrators thereof; but

they must not become parties with others in the transgression of the law. This does not preclude such officers, however, where they are informed that a person is engaged in, or is about to commit a crime, from taking such steps as will put them into possession of all available information attending the acts and demeanor of such person, so as to enable them to bring the perpetrator to account. And the law even goes so far as to uphold such officers where they merely aid one in the commission of a crime, where the crime has been conceived, or concocted, or initiated, by the accused. "The rule," say the courts, "does not proceed from or rest on any limitation of the right of the officers of the law to obtain evidence of crime in any manner possible. Nor is it a defense to a prosecution that the officer participated in the commission of a crime, if the genesis of the idea or the real origin of the criminal act, sprang from the defendant and not the officer." The differentiation is thus otherwise stated: "The fact that a detective or other person suspected that the defendant was about to commit a crime, and prepared for the detection, as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design."

This is a sufficient exposition of the law, and the application is for your judgment, in the light of the evidence adduced here upon the trial. The course of your inquiry upon this subject will naturally be to ascertain whether the defendant first conceived the idea or purpose [276] of then uttering statements upon and discussing the war situation, and of ex-

pressing himself as his disposition prompted him; that is to say, whether the discussion entered upon there, or what he said there, originated with him, or whether he was incited and induced by the officers in the beginning, or in its initiatory stage, to enter upon the transgression of the law, and thereby lured him to do that which he had not previously criminally conceived of, or that which had not originated in his own mind. If you find that the former was the case, that is, that the purpose of thus transgressing the law originated with the defendant, he would be amenable to the law, notwithstanding the officers may have availed themselves of the situation for possessing themselves of and preserving and presenting the evidence of what he did. But if, on the other hand, the officers of the law, and those acting with them, first suggested, or lured the defendant to take the initiatory step, or put into his head the original thought or idea of committing the offense charged, and he thenceforward acted under their dominating influence, then he could not be held guilty under these first four counts.

Your deduction and conclusion on this subject will be resolved by a careful and considerate survey of all the testimony bearing thereon, or that may serve to enlighten you.

Referring to the second contention, namely, that the defendant was so drunk at the time that he was incapable of forming an intent or design, I instruct you as follows:

Intent is an essential element in the perpetration of each of the four offenses charged against the de-

fendant in these first four counts of the indictment. If the [277] intent is absent, the defendant cannot be held accountable for what he is alleged to have done. Drunkenness is no excuse for the commission of a criminal offense, yet while this is the law, it is also the law that, where a specific intent is necessary to be proved before a conviction can be had, it is competent to show that the accused was at the time wholly incapable of forming such intent, whether from intoxication or otherwise. In other words, it is a proper defense to show that the accused was intoxicated to such a degree as rendered him incapable of entertaining the specific intent essential to the commission of the crime charged.

I therefore instruct you, gentlemen of the jury, that, if the defendant was intoxicated at the time of making any of these statements which are set forth in counts one, two, three and four, to such an extent that he could not deliberate upon or understand what he said, or form an intention to say what he did, your verdict should be not guilty. Otherwise, such a conclusion would not necessarily follow.

This, as I have indicated, pertains to the first four counts in the indictment.

It is common knowledge, however, that a person who is much intoxicated may nevertheless be capable of understanding and intending to utter the things that he is pleased to speak. And, as I have advised you, evidence of drunkenness is admissible solely with reference to the question of intent. The weight to be given it is a matter for the jury to determine, and it should be received with great caution and carefully

examined in connection with all the circumstances and evidence in the case. [278]

You should discriminate between the conditions of mind merely excited by intoxicating drink, and yet capable of forming a specific intent and purpose, and such a prostration of the faculties as renders a man incapable of forming an intent. If the intoxicated person has the capacity to form the intent, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was too intoxicated to conceive it readily by reason of his intoxication.

You have heard the testimony relating to the defendant's alleged intoxication at the time, and you should consider the whole of it bearing upon the subject, coming from whatsoever source, and determine for yourselves the extent of the defendant's intoxication, if you find that he was intoxicated, and to what extent, if at all, it impaired his faculties, whether to the extent of rendering him wholly incapable of forming an intent, or whether his faculties were still left in such a condition as that he was yet able to think and reason, and to form a design of his own to do things upon his own account. If he was, then he would be amenable.

You will note, gentlemen, that the term "wilfully" is employed in the statement of the statutes as to what will constitute the offense. The word "wilfully," as I have stated, is defined as meaning willingly, purposely, intentionally, as distinguished from accidentally or inadvertently. This means that the acts complained of must have been done with knowl-

edge on the part of the defendant of what he was doing, and that he, having such knowledge, intentionally did the acts and intended thereby and had such purpose therein that the result of doing such acts would be to cause insubordination, disloyalty, or [279] refusal of duty in the military service, or would tend to impede or hinder the recruiting and enlistment of men into the service and the like, to the injury of the United States, or do those other things charged against him in the indictment.

I will now instruct you further as to the meaning of the word "intent." The criminal intent essential to any violation of the statute means a wicked, evil, or wilful intent to accomplish or produce the results forbidden and made punishable by the statute, and where words only are relied on to establish a violation of the statute they should be closely regarded, as the witnesses testifying that oral statements were made by defendant may have misunderstood what he said, and may have unintentionally altered a few of the expressions really used giving an effect to the statements completely at variance with what the party really did say.

Intent and purpose are largely a matter of the mind and heart; and you must be guided pretty largely by a man's acts and demeanor. You must look into his heart and see what a man has there. What a man says as to his intention is not controlling unless the jury believes him. The jurors have a right to and should consider what he says and give it proper weight according to the credibility due him, together with all the other evidence in the case, and

determine what his real purpose and intention were. So it is here. You must judge this defendant as to his true intention and purpose, not only by what he says, having in mind his credibility, but by what he has done, by his acts and conduct at the time and previously, and his acts and conduct as you have observed them here. In this relation, I will say that the law presumes that every man intends the natural consequences of his acts knowingly committed, or his [280] spoken words, or in a case like this in which a specific intent affecting the act is a necessary element of the offense charged, the presumption is not conclusive, but is probatory in character. It is for the consideration of the jury in connection with all the other evidence in the case, considering all the circumstances as you may find them, including the kind of person that made the declaration, the place at which the declarations in this case were made, the persons who were present, and all the circumstances attending them, to the end that you may judge the real intent with which they were made. In a case of this character the jury may find from the facts and circumstances, together with the language used, the intent, even though the intent was not expressed—directly expressed. In other words, you may infer the intent from the character and the natural ordinary, necessary consequences of the acts.

Now, gentlemen, this is sufficient reference to the specific crimes charged against the defendant. Each and all of the elements of the offenses charged in the seven counts, which will be submitted to you, as I have already stated and now repeat, must be found

by you from the evidence beyond a reasonable doubt. The number of counts contained in the indictment must not be permitted to influence your judgment as to the guilt or innocence of the defendant. You are not to assume that the defendant is guilty of something because there are so many charges made against him. Each charge, as I have advised you, is a separate charge of a separate independent crime. If the evidence justifies it, the defendant may be found guilty of all or any of the offenses charged, and he should be acquitted upon all or any of the charges, if the evidence does not warrant conviction.

I have also said to you, and I repeat, that you must find beyond a reasonable doubt that the defendant uttered [281] the words and language charged, as set out in the several counts of the indictment, or the substance and effect thereof.

It is not necessary that the Government should prove beyond a reasonable doubt that the defendant used the exact language charged in the indictment, or that he used all of the language charged therein, or that the language charged therein is all that was uttered or spoken by him at the times and places in question.

It is, however, necessary that the Government should prove, beyond a reasonable doubt, that he did utter and speak the substance of the words and language charged in the several counts, considering each count as a separate and distinct charge, that is, language of the same tenor and effect as therein set out; but it is not necessary that the Government prove that he used the substance and effect of all the words

and language charged. It will be sufficient if you find beyond a reasonable doubt that he used the exact words, or the substance thereof, or words and language of the same tenor and effect, or so much thereof as is sufficient to constitute under the first count the offense of wilfully causing or attempting to cause, or inciting or attempting to incite, either insubordination or disloyalty or refusal of duty in the military or naval forces of the United States; or under the second count, as shall be sufficient to constitute the offense of wilfully obstructing or attempting to obstruct the recruiting and enlistment service of the United States; or, under the third count, as shall be sufficient to constitute the offense of wilfully uttering language intended to incite, provoke and encourage resistance to the United States, and or promote the cause of its enemies; or, under the fourth count, shall be sufficient to constitute the offense of wilfully supporting or favoring the cause of the Imperial Government of [282] Germany, and or opposing the cause of the United States in the war; or, under the fifth, sixth, and seventh counts, as will be sufficient to constitute the offenses therein severally charged and set forth.

I have already said to you that you must find, beyond a reasonable doubt, that the defendant wilfully uttered or spoke the words or language imputed to him, and that wilfully means willingly, knowingly, purposely, intentionally, and as contradistinguished from accidentally or inadvertently; and that you must find that the defendant had the specific criminal intent as charged in each of the seven counts.

Ignorance of the law, of course, excuses no one. A person accused of a crime cannot be heard to say that he did not know the law; but notwithstanding this rule, what the defendant's intentions were when the words were spoken is essential, and it must be shown, in order to convict, that his specific intentions were to violate the law in the specific manner charged.

Now, in this connection and as bearing on the question of intent, you should be careful not to mix motive with intent. Motive is that which leads to the act; intent is that which qualifies it. A crime may be committed with what may be regarded as a good motive, or it may be committed with an evil motive, or it may be committed with a good and an evil motive. So that no matter if the defendant's motive and purpose may have been good and has been merely that which I have above stated, namely, to convey information to his fellow-citizens in the assumed exercise of the right and in the belief that he was exercising the constitutional right of free speech, he is nevertheless guilty if he had the specific criminal intent to accomplish the acts and to produce the effect and [283] result forbidden by the specific provisions of the law to which I have called your attention.

If you find beyond a reasonable doubt that he had a specific criminal intent to produce the results and the consequences forbidden by the law, then he is guilty, no matter whether he uttered these things in the exercise of a belief that he was promoting some good and worthy cause. If, however, you do not so find be-

yond a reasonable doubt such specific criminal intent, then it is equally your duty to find him not guilty.

In scrutinizing and weighing the evidence, particularly in weighing the words and utterances of the defendant, or such part thereof as you may find, beyond a reasonable doubt, were uttered or published, you must take the words and language as an entirety and as a whole. It is by the general purport and effect, by purport and meaning of the entire utterance, that the defendant is to be judged, and not by isolated sentences taken from the context. The context may often qualify the meaning, purport and effect of some particular sentence or word. Sentences and some words standing alone may convey an entirely different meaning and may have a natural and reasonably probable tendency to produce an entirely different effect or understanding on the jurors than taken in connection with the context from which they are excerpted. It is, therefore, proper that you should and must consider the language as a whole.

You are also to weigh and consider these words and utterances in the light of all the surrounding circumstances as shown by the evidence, the time, the place and occasion when uttered, the persons present and listening thereto. You are to give to his words if you believe he uttered them, their [284] natural, common-sense meaning, unless the context or the evidence shows that they were used by the defendant in a sense different from their every-day common-sense use. It is the sense in which these words and utterances would be naturally understood by persons to

whom they were addressed, and who heard them, that is the important consideration in determining their meaning, purpose and effect.

Now, certain testimony has been permitted to go to you as statements made by the defendant at other times than the occasion charged in the indictment. This testimony, as I have said to you at the time of its admission, and as I wish to repeat now, was permitted to go to you and is to be weighed by you only in enabling you to find the intent with which the words and language were uttered as charged in the indictment, if they were uttered at all. The defendant is not on trial and is not to be tried for any other offenses than those charged in the indictment. Utterances made by him at any other time or place are not to be weighed by you for the purpose of enabling you to find that he uttered the language charged or that he committed the offense charged at that time and place, but only if you shall find from the evidence relating thereto beyond a reasonable doubt that he uttered the language or substance of it, as charged in the indictment, at that time and place, and that the natural or reasonably probable tendency and effect thereof was to produce results forbidden by the provisions of the law and covered by the seven counts of the indictment, then and in that event being required to pass to a consideration of the specific intent with which he made the utterances, you may for that purpose alone weigh and consider the testimony permitted to go to you as to what he said at some other time or place. [285]

To further explain to you the purpose of allowing

testimony touching statements made by defendant at other times than the occasions charged in the indictment, I instruct you that it was not to prove the utterances of the language set forth in the indictment, and it should not be so considered by you, but to show the bent of defendant's mind and his attitude as between this country and Germany, with a view to enabling you to determine the defendant's real intention in saying and doing what the evidence convinces you that he has said and done, as it pertains to the charges made against him.

The defendant was born in Germany, but later came to this country and has since become naturalized in pursuance of the laws of the United States, so that he is a citizen of the United States, and is entitled to the same rights and privileges as other citizens of this country. He may engage in the discussion of public questions, and of men and measures, but he, like any other citizen or person sojourning in this country, temporarily or otherwise, is required to observe the laws of this country and the rules and regulations for assembling the armies and navies for the carrying on of the present war with Germany; and is answerable, like other persons, for the transgression of those laws, rules, and regulations.

The defendant has taken the witness-stand in his own behalf, and has denied in large measure the utterances imputed to him, and as to others he disclaims any wrong or disloyal intention. In determining touching the credibility of his statements, you will take into consideration the testimony of the

Government which tends to his inculpation, his former history and deportment, his bent of mind so far as is disclosed by the testimony, and his predilection, if any, whether favorable or unfavorable to this Government, and what [286] leaning, if any, he has towards Germany as against this Government in the present crisis, or whether his present leaning is one of loyalty to this Government, and, from all this, together with all the other testimony in the case bearing upon the subject of inquiry, you will ascertain and determine by a calm, fair, and impartial inquiry and investigation, uninfluenced by any present passion or prejudice, the truth of the charges made against him in the indictment, and thus you will resolve your verdict, whether it shall be one of guilty or not guilty.

I instruct you, gentlemen of the jury, that you are the sole judges of the credibility of witnesses and the weight and value to be given to their testimony. The Court gives you the law of the case, and it is your duty to take the law implicitly from the Court and apply it and observe the rules as the Court has laid them down for your guidance. It is a rule of law as well as of reason that positive testimony is of greater weight than negative. In determining as to the credit you will give to a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and the appearance of the witness upon the witness-stand; the interest of the witness, if any, in the result of the trial; the motives of the witness in testifying, the witness' relation to or feeling for or against the

defendant or the alleged injured party; the probability or the improbability of the witness' statements; the opportunity the witness had to observe and to be informed as to the matters respecting which such witness gives testimony, and the inclination of the witness to speak the truth, or otherwise, as to matters within the knowledge of such witness; and you should be slow to [287] believe that any witness has testified falsely, but should strive to reconcile the testimony of all the witnesses so as to give credit and weight to all the testimony if possible. But it is a rule of evidence that a witness found to be false in one particular is to be distrusted in all. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such value and weight as you deem proper. Having determined the credibility of the witnesses, you will then be able to determine what the facts are under the testimony, and thereby be enabled to render your verdict.

I will say, in this connection, that the defendant has been a witness in the case in his own behalf. You will treat him as any other witness in the case and apply the same rules in order to determine his credibility as you would apply to the other witnesses, taking into consideration his interest in the case or the outcome thereof.

What the Court may have said during the trial of this cause at any time, from which you might infer that the Court has an opinion as to the facts proved, you will disregard, because it is wholly within your province to determine the effect of the testimony.

It is hereby certified that the instructions heretofore set out herein as having been given by the Court to the jury are all of the instructions given by the Court to the jury.

And within the time limited by the rule of the Court so to do, the defendant in writing requested the Court to give to the jury the following instruction:

> The mere utterance or use of the words and statements set forth in the several counts of the indictment does not constitute an offense in any of said counts. Before a [288] defendant is guilty of violating the statute by oral statements, such statements must be made wilfully and with the specific intent made necessary by the statute, and such words and oral statements must be such that their necessary and legitimate consequence will produce the results forbidden by the statute.

Except as the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception by the Court.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

> While it is a rule of law that every person is presumed to intend the necessary and legitimate consequences of what he knowingly does or says, the jury, however, has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence

thereof. A jury has no more right to draw an inference from words that do not necessarily and legitimately authorize such inference than to find any other fact without evidence.

The Court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

If you find from the evidence that F. B. Tichenor, a deputy United States marshal, and L. E. Gaumaunt, a deputy sheriff of a county in the State of Washington, induced and incited, or lured the defendant on to make the statements charged in the indictment under the circumstances under which it has been testified such statements were made, and that said officers thereby procured the defendant to make said statements, you should find the defendant not guilty upon each of the Counts 1, 2, 3 and 4 of the indictment.

The Court refused to give this instruction to the jury, and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instructions to [289] the jury:

If the defendant was intoxicated at the time of making any of the statements set forth in Counts 1, 2, 3 and 4 of the indictment, to such an extent that he could not deliberate upon or understand what he said, or have an intention to

say what he did, you should find the defendant not guilty upon each of said Counts 1, 2, 3 and 4 of the indictment.

While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if upon the whole evidence in this case, by reason of defendant's intoxication (if you find he was intoxicated at the time), you have such reasonable doubt whether at the time of the utterance of the alleged language (if you find from the evidence defendant did utter said language) that defendant did not have sufficient mental capacity to appreciate and understand the meaning of said language and the use to which it was made; that there was an absence of purpose, motive or intent on his part to violate the Espionage Act at said time, then you cannot find him guilty upon Counts 1, 2, 3 and 4, although such inability and lack of intent was the result of intoxication.

The Court refused to give this instruction to the jury, and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

If the jury finds that the defendant made the statements alleged in Counts 1, 2, 3 and 4 of the indictment, and that said statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts, 1, 2, 3 and 4.

The Court refused to give this instruction to the

jury, and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time defendant requested in writing that the Court give the following instruction to the jury:

> Before you can find the defendant guilty under Count 3 of the indictment you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements or the substance thereof alleged and set forth in that count of the indictment; second, that he made said statements willfully and with the intention to incite, provoke or encourage resistance to the United States and to promote the cause of its [290] enemies; and, third, that said statements, if you find beyond a reasonable doubt that any were made, would naturally and legitimately incite, provoke or encourage resistance to the United States and to promote the cause of its enemies.

The Court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

> Under the allegations of Count 3 of the indictment *it* the Government must prove to your satisfaction beyond a reasonable doubt, before you can find the defendant guilty, that the defendant willfully intended by the alleged statements both to incite, provoke and encourage re-

sistance to the United States and to promote the cause of its enemies, and it will not be sufficient for the Government to prove that the defendant willfully intended to bring about only one of such results.

The Court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

The words "support," "favor" and "oppose" import willfulness and intent, and it is alleged in the indictment that the statements set forth therein were made willfully. Therefore, before you could find the defendant guilty under Count 4 of the indictment, you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements as alleged in the indictment or in substance as alleged in the indictment; second, that the statements made by defendant, if you find beyond a reasonable doubt that he made any of the statements alleged, would naturally aid, defend and vindicate the cause of the Imperial German Government with which the United States was then and there at war, and would also naturally, necessarily and legitimately hinder and defeat or prevent the success of the cause of the United States in said war; and third, that said statements, if any, were made by the defendant willfully and knowingly with intent to support and

favor the cause of the Imperial German Government in said war, and oppose the cause of the United States therein.

The Court refused to give this instruction to the [291] jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instructions to the jury:

Under the charge of Count 4 of said indictment the Government must satisfy you beyond a reasonable doubt that the defendant criminally intended both to support and favor the cause of the Imperial German Government and to oppose the cause of the United States in the war, and that the statements made, if any, would naturally produce both said results; otherwise you should acquit the defendant.

The Court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

E. C. Bendixen was produced by the Government as a witness to prove the charges set forth in Counts 1, 2, 3 and 4 of the indictment. You are instructed to disregard the testimony of said witness Bendixen for the reason that the testimony given by him does not tend to support the charges in said counts of the indictment.

The Court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant in writing requested the Court to give to the jury the following instruction:

> The statute upon which the indictment in the case is based is an enactment adopted by Congress for the purpose of aiding the Government's war activities and preventing interference therewith. The statute is operative only when the United States is at war; its operation and application begin when war begins, and when war ends the statute ceases to be operative. All of the provisions of the section of the statute upon which the indictments in the case are based have reference to war activities and war measures of the United States, or to the conduct intended to promote the success or cause of its enemies [292] in the war, so that utterances concerning the war which are not intended to and do not interfere with or affect in any way the war activities or war measures of the United States and do not promote the success or cause of its enemies do not violate the statute.

Except as the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception by the Court.

And within the same time the defendant in writ-

ing requested the Court to give to the jury the following instruction:

> "Promote," as used in the charge of Count 3 of the indictment, means to help, to give aid, or assistance to the enemies of the United States in the waging of the war.

Except as the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception by the Court.

And within the same time the defendant in writing requested the Court to give to the jury the following instruction:

> "The cause of its enemies," as used in Count 3 of the indictment, means any and all of the military measures taken or carried on by such enemies for the purpose of winning the war as against the United States.

Except as the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception by the Court.

And within the same time the defendant in writing requested the Court to give to the jury the following instruction:

> Counts 5, 6 and 7 of the indictment are based upon Section 3 of the Espionage Act as it existed prior to its amendment May 16, 1918. That section of the statute prior to its amend-

ment contained three clauses for which a criminal punishment was provided. [293]

Except as the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception by the Court.

Before the jury retired the defendant was allowed by the Court an exception to the action of the Court in giving the following instruction to the jury:

> It is proper that I should instruct you as to what is meant by resistance to the United States as used in this law and in this charge. The other words in the law and in the charge are plain and were used and have been used, in my opinion, in the ordinary, every-day, common-sense meaning.
>
> Resistance as a proposition of law means to oppose by direct, active and *quasi*-forcible means the United States; that is, the laws of the United States and the measures taken under and in conformity with those laws to carry on and prosecute to a successful end the war in which the United States was then and is now engaged. Resistance means more than mere opposition or indifference to the United States or to its success in this war. *In* means more than inciting, provoking, or encouraging refusal of duty or obstructing or attempting to obstruct the United States. The element of direct, active opposition by *quasi*-forcible means is required to constitute the offense of resisting the

United States under this provision of the law and under this charge of the indictment. The offense, however, may be committed by wilfully and intentionally uttering language intended to promote the cause of the enemies of the United States without necessarily inciting, provoking, or encouraging forcible resistance to the United States. To promote means to help, to give aid, assistance to the enemies of the United States in the waging of this war. The cause of the enemies of the United States means any and all of their military measures taken or carried on for the purpose of winning the war as against the United States. The cause of the United States as used in this act does not mean the reason which induced the Congress of the United States to declare a state of war between the United States and the Imperial Government of Germany. It does not mean the aims of the war in the sense of the terms of peace to be imposed or the results to be accomplished or the time and conditions under which it is to be brought to a termination. In plain language, it means the side of the United States in the present impending and pending struggle. The words "oppose" and "cause" should be weighed and considered by you as limited to opposing or opposition to such military measures as are taken by the United States under lawful authority for the purpose of prosecuting that war to a successful and victorious determination. [294]

Now, because all the foregoing matters and things

are not of record in this case, I, CHARLES E. WOLVERTON, the Judge who tried the above-entitled cause in the above-entitled court, do hereby certify that the foregoing bill of exceptions correctly states all the proceedings had before me on the trial of said cause, and contains all of the testimony offered and introduced by the parties upon said trial, and contains all of the instructions of the Court to the jury and truly states the rulings of the Court upon the questions of law presented and the exceptions taken by the defendant appearing therein were duly taken and allowed; that said bill of exceptions was prepared and submitted within the time allowed by the order of the Court, and is now signed, sealed and settled as and for the bill of exceptions in said cause and the same is hereby ordered to be made a part of the record in said cause.

It is further ordered that all of the original exhibits introduced in evidence in the trial of this cause and now in the custody of the clerk of the Court be made a part of this bill of exceptions and filed herein.

IN WITNESS WHEREOF I have hereunto set my hand this 28th day of May, 1919.

CHAS. E. WOLVERTON,
United States District Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within bill of exceptions is hereby accepted in Portland, Multnomah County, State of Oregon, this 14th day of May, 1919, by receiving a

copy thereof duly certified to as such by John McCourt, attorney for defendant.

BARNETT H. GOLDSTEIN,
Asst. United States Attorney for Oregon.

Filed May 28, 1919. G. H. Marsh, Clerk. [295]

AND AFTERWARDS, to wit, on the 18th day of June, 1919, there was duly filed in said court a praecipe for transcript of record, in words and figures as follows, to wit: [296]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY ALBERS,
Defendant.

Praecipe for Transcript of Record.

To George H. Marsh, Clerk of the Above-entitled Court:

Please prepare a record and transcript for making the return of writ of error heretofore allowed in the above-entitled cause and include therein the following records and papers:

1. The indictment.
2. Journal entry of arraignment and plea.
3. Order permitting defendant to withdraw plea and allowing defendant to file a demurrer to the indictment.

4. Demurrer to the indictment.
5. Order overruling demurrer to the indictment.
   (Note: Reference is had to the demurrer filed to all of the counts of the indictment. It is not necessary to include the special demurrer and orders thereon interposed to counts 5, 6 and 7 of the indictment.)
6. Journal entry upon entry of plea after hearing and ruling upon demurrer.
7. Journal entries relating to empanelling of jury and trial of cause.
8. Formal motion of defendant for directed verdict and Journal entry, if any, thereon.
9. Verdict. [297]
10. Motion in arrest of judgment.
11. Order overruling motion in arrest of judgment.
12. Sentence and judgment.
13. Order allowing writ of error, undertaking of defendant and other papers relating to writ of error.

Dated this 17th day of June, 1919.

(Signed) VEAZIE, McCOURT & VEAZIE,
Attorneys for Defendant.

Filed Jun. 18, 1919. G. H. Marsh, Clerk. [298]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 3 to 298, inclusive, constitute the transcript of record upon the said writ of error in accordance with the praecipe for transcript filed in said cause by the plaintiff in error in a cause in the District Court of the United States, for the District of Oregon, in which the United States of America is plaintiff and defendant in error, and Henry Albers is defendant and plaintiff in error; that the said transcript of record is a full, true, and complete transcript of the record of proceedings had in said court in said cause in accordance with the said praecipe for transcript, as the same appear of record and on file in my office and in my custody. I further certify that I return, with the said transcript attached, the writ of error issued in said cause to the District Court of the United States for the District of Oregon, and the original citation.

And I further certify that the cost of the foregoing transcript is $93.00, and that the same has been paid by the said plaintiff in error.

In testimony whereof, I have hereunto set my hand

and caused the seal of said court to be affixed this 27th day of August, 1919.

[Seal] G. H. MARSH,
Clerk. [299]

[Endorsed]: No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Henry Albers, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed August 30, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Government's Exhibit "A."

Kent, Wash., Nov. 6, 1918.

My dear Mr. Heeney

I have been very much worried since I came back from Portland in regards to the Alber's case, I ansered the questions asked me correctly but their was other things happened which I was not asked, and I been afraid that his attorney might ask of these happenings and I am not posted as to what I should do, You said you wanted Mr. Albers to have a fair trail and also the Gov. and that has also worried me, I will now tell you of some of things that happened, not that I want to try and save him, but save myself from any further trouble. After I heard him make

the remark about Mr. McAdoo I told him that he better keep his mouth shut and I told him I was an officer from the State of Washington, and he would get himself in trouble, now Mr. Heeney don't you think he must have been pretty drunk otherwise he would have shut his mouth, The jury asked me how drunk he was, and I think it was my place to have told them then but Mr. Tichneor told me to anser only what I was asked, now I am asking you to advise me, Mr. Bendixen was talking to him in the early part of the evening, and never made any remark to anyone in regard's to Albers, although he knows Tinchneor, I believe. So I went in the wash room and sat down and then the party began, it was late in the eve, when I went to look for the fellow who was who was with him who latter proved to be Bendixon. I don't know whether their is any personal feelings between ~~any~~ ~~of~~ ~~the~~ Bendixon or Albers, only Bendixon said he had an uncle in the firm, I also heard some people say when I was at the hotel that Tichneor said if Albers was not found guilty he would throw his star in the lake and jump in after it, but I did not let them people know who I was. These are the things I think you should know, now that I care for Albers in the least and if he found guilty it is due to you good judgment and I think your the man to know it all. If these things I said will in any way interfear with what I said, why let me know, as I don't want to make a mess out of this. You said tell the truth which I am doing but the jury did not ask me about this so I said nothing but since that time I have worried about these things and now

I feel much better. If at any time you should want to let me know about this why this is my address. If you don't remember me by name you will remember me by the white sweater as you called me.

L. E. GAMAUNT,
c/o Ford Agency,
Kent,
Wash.

Kindly advise me as to what I should in regards to this matter

[Endorsed]: U. S. District Court, District of Oregon. Filed February 5, 1919. G. H. Marsh, Clerk.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 30, 1919. F. D. Monckton, Clerk.

Government's Exhibit "B."

3086–1—c

November 6, 1918.

Mr. L. E. Gamaunt,
C/o Ford Agency,
Kent, Wash.

Sir:

Attendance upon the court in trial has prevented an earlier reply to your letter of the 6th inst., which is hereby acknowledged.

I note what you say and in reply have only to say that the Government expects you to tell the truth, the whole truth, and nothing but the truth, when you are called as a witness; neither less nor more than

that will satisfy the Government or be fair to the defendant.

I cannot advise you as to when the case will be tried but imagine it will be shortly after January the 1st.

Respectfully,
UNITED STATES ATTORNEY.

[Endorsed]: U. S. District Court, District of Oregon. Filed Feb. 5, 1919. G. H. Marsh, Clerk.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 30, 1919. F. D. Monckton, Clerk.

Defendant's Exhibit No. 1.

Statements of a German on 54 Oregonian about 8–45 P. M., 10–8–18, as follows:

Tey'l never lick the Kiser, not in a 1000 years

I am a German & dont deny it.

Once a Geman always a German.

Then spoke in German using words Rhine Sprekin offen & etc

Later when I entered he asked me if I played the game I answered that I played the oil game pretty strong.

He then asked me the same question & I answered only the oil game

He then said "You dont know what I mean you are a damm fool."

[Endorsed]: U. S. District Court, District of Oregon. Filed Feb. 5, 1919. G. H. Marsh, Clerk.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 30, 1919. F. D. Monckton, Clerk.

Defendant's Exhibit No. 2.

Nov. 12–19–18

Mr. G. Albers.

This is something I don't like to do but I can't help it, ever since I got mixed up in your brother's case why I am losing most of my friends down here, I have been upholding him, in all respects whenever I was asked about him. My wife also is against me and says if he is saved why she will leave me, now if she wants to she is welcome to go tomorrow and the rest can go somewhere else, what I want to ask you is this will your brother look after me after the matter is finished, I have a good job here and am making big money, if he is saved why I loose everything which I cannot afford as I have nothing now only property which belongs to my wife I am willing to sacrifice it all to save him if he will take care of me after it is all finished which would be fine on his part You asked me about when the case was coming up I didn't think I should tell you but I see your interest is in the business, Mr. Heeney our attorney told me it would be either the 24th of this month or ten day's latter, our chances are very good I think, I told Mr. Heeney lots in my letter which the jury did not ask me, and I think he has another view point of the case. I am going to stay with it if they put me in jail, would like to see you but figure it better not too. Kindly burn this up as

is means alot to me at this time Kindly let me know your view of this matter, Mr. McGuir told me everything would be O. K. when I told him I would have to leave Kent, so I thought I would ask you I am a special Deputy here otherwise I would have been licked I guess.

Hoping everthing will be O. K,

I remain,

L. E. GAMAUNT.

Excuse pencil as I am in a hurry and going to Seattle on business and thought it would be a good chance to bring this to your house myself.

[Endorsed]: U. S. District Court, District of Oregon. Filed Feb. 5, 1919. G. H. Marsh, Clerk.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 30, 1919. F. D. Monckton, Clerk.

Defendant's Exhibit No. 2a.

[Envelope]

MR. ALBERS.

[Endorsed]: U. S. District Court, District of Oregon. Filed Feb. 5, 1919. G. H. Marsh, Clerk.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 30, 1919. F. D. Monckton, Clerk.

In the District Court of the United States, for the District of Oregon.

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Order Under Rule 16 Extending Time to and Including August 15, 1919, to File Record and Docket Case.

Now, on this day, this cause coming on to be heard upon the motion and application of the defendant for an extension of time for making and filing the transcript and record herein, and making and filing the return upon the writ of error heretofore allowed herein; and it appearing to the Court that the records and other papers constituting the transcript in the above-entitled cause are voluminous and that the same cannot be completed and filed within the time remaining therefor under the rules of the Court:

IT IS, THEREFORE, HEREBY ORDERED, that the time be, and the same hereby is, extended to and including the 15th day of August, 1919, within which the Clerk of this Court shall make return upon the writ of error heretofore allowed in the above-entitled cause and transmit the transcript to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Done at Portland, Oregon, this 16th day of June, 1919.

CHAS. E. WOLVERTON,
District Judge.

[Endorsed]: No. ——. In the District Court of the United States for the District of Oregon. United States of America vs. Henry Albers, Defendant. Order Extending Time for Making and Filing Transcript and Record, and Filing Return Upon Writ of Error.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including Aug. 15, 1919, to File Record Thereof and to Docket Case. Filed Jun. 20, 1919. F. D. Monckton, Clerk.

In the District Court of the United States for the District of Oregon.

No. 8159.

August 5, 1919.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Order Under Rule 16 Extending Time to and Including August 31, 1919, to File Record and Docket Case.

Now, at this day, for good cause shown, it is ORDERED that the time for filing the transcript of record on writ of error in this cause and docketing

this cause in the United States Circuit Court of Appeals, for the Ninth Circuit, be and the same is hereby extended to August 31, 1919.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: No. 3385. United States Circuit Court of Appeals, for the Ninth Circuit. Order Under Rule 16 Enlarging Time to —— to File Record Thereof and to Docket Case. Filed Aug. 14, 1919. F. D. Monckton, Clerk. Re-filed Aug. 30, 1919. F. D. Monckton, Clerk.

No. 3385.

In the United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ALBERS,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the District Court of the United States for the District of Oregon

CHARLES H. CAREY,
VEAZIE, McCOURT & VEAZIE,
Attorneys for Plaintiff in Error.

Keystone Press, 100½ Front Street

TOPICAL INDEX.

TABLE OF CASES CITED.

No. 3385.

In the United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ALBERS,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the District Court of the United States for the District of Oregon

STATEMENT OF THE CASE

Plaintiff in error prosecutes his Writ of Error herein to correct errors occurring on his trial which resulted in his conviction of a charge of violating Section Three of the war statute commonly referred to as the Espionage Act, as amended May 16, 1918. The indictment herein was returned by the Grand Jury on November 2, 1918. It charged plaintiff in error in seven counts with violation of Section Three of the Espionage Act. The first four counts of the indictment were based upon utterances of the plaintiff in error which he was

heckled and provoked into making on October 8, 1918, by officers of the law and others acting with them while he was in a condition of maudlin drunkenness in the smoking room of a Pullman car enroute from San Francisco to Portland, Oregon. The last three counts of the indictment were based upon conversations and discussions which occurred at various times prior to March 1, 1918, between plaintiff in error and one N. F. Titus, and which as the evidence disclosed were not of a character prohibited by the Espionage Act.

Upon the trial the jury returned a verdict of guilty against the plaintiff in error upon Counts 3 and 4 of the indictment, and acquitted him upon the five remaining counts. At the close of the evidence, counsel for plaintiff in error requested the Court to direct the jury to return a verdict of not guilty upon each count of the indictment. Plaintiff in error also interposed a motion in arrest of judgment, which includes among others the contentions urged by plaintiff in error in support of the request for a directed verdict.

Evidence was introduced by the prosecution tending to prove that at the time and place alleged plaintiff in error made the statements charged in the indictment, with the exception of the statement numbered eleven, in each of the first four counts of the indictment. Consequently, for the purposes of the writ herein and the assignment of errors it must be assumed that plaintiff in error uttered

the statements set out in the indictment, at least in substance. Plaintiff in error, however, urges that in view of the circumstances under which the utterances were elicted and made, their nature, the persons in whose presence they were made, the place where they were made, and the condition of the plaintiff in error at the time, the criminal intent essential for conviction of a violation of the statute could not have been present, and the jury could not have properly found such intent to exist to their satisfaction beyond a reasonable doubt. A clear understanding of the contention of the plaintiff in error in the respect mentioned and respecting instructions given and requests for instructions refused requires some reference to the evidence adduced at the trial. (Figures in parentheses refer to pages of the printed transcript.)

The evidence disclosed in substance that plaintiff in error is 53 years of age. He was born at Lingen, a small town on the River Ems in Hanover, Germany. He left the place of his birth in 1891 when he was about 25 years of age, and came directly to Oregon. Plaintiff in error is the third child of a family of six boys and three girls. His two brothers older than he, Herman and Bernard, preceded plaintiff in error to the United States. His younger brothers and his only surviving sister, together with his father, came to the United States soon after he did. His mother died when he was eight years of age. Neither plaintiff in error nor any of his younger brothers ever saw military serv-

ice in Germany. His older brothers, both of whom died some years prior to 1909, were each required to engage for a short time in the German military service before they came to this country. Plaintiff in error went to school in Germany until he was 14 years of age, and afterwards learned something of the milling business—making cereals. He had about Three Hundred Dollars when he came to the United States, and each of his brothers had a like sum of money. (216.) Neither plaintiff in error nor any of the members of his family had any property or interest of any kind in Germany at any time after they emigrated therefrom. After plaintiff in error came to the United States he applied himself for about four years to all sorts of work, including dishwashing, baking, cooking, and janitor work. He was admitted to citizenship in 1900, and had voted regularly ever since, and even before. In 1895, Bernard Albers, Mrs. Schneider, and plaintiff in error started a little feed and cereal mill on Front and Main Streets in Portland, Oregon. They called it the United States Mills. His younger brothers, Will, George and Frank, worked about the mill. Plaintiff in error did the mill work, Mrs. Schneider, the inside work, and his brother Bernard tended the office. (211-214.) The business thus started has developed into the string of mills that the Albers Brothers Milling Company owns, located at Portland, Seattle, Bellingham, San Francisco, Oakland, Los Angeles and Ogden. (214.) The corporation known as the Albers Brothers Mill-

ing Company was organized in 1903. Plaintiff in error was president thereof from its organization until after the incident upon which the indictment against him is based. The members of the Albers family have at all times owned a large majority of the stock of the corporation, plaintiff in error having the largest individual holding of any stockholder in the corporation. (189, 190, 225.)

The hard work and long hours put in by him in developing his business impaired his health, and for the past three or four years he has not been as active as formerly. Virtually all of plaintiff's property holdings consist of his stock in the Milling Company, and the record of all his personal expenditures appears in the Corporation records. (214, 215, 188, 193.) Neither plaintiff in error nor his brothers at any time contributed or subscribed anything to any German interest or project either in connection with the war or otherwise, and no German money of any kind was at any time invested in the mill properties with which plaintiff in error is connected. (188, 193, 215, 216.) The Albers Brothers Milling Company, after the entry of the United States into the war with the active approval of plaintiff in error, subscribed liberally to every issue of Liberty Bonds put out by the United States, altogether $300,000.00, and made substantial contributions to every character of activity conducted in connection with the war; the aggregate of such contributions was $32,332.50; at the same time, a large portion of the dock space of the Albers Broth-

ers Milling Company, visited by plaintiff in error every day, was given up to the storage of Government supplies. (185, 186, 187, 189, 221.)

The Albers Brothers Milling Company has approximately 1000 employees, men and women· about 102 of the men went into the military and naval service, most of them as volunteers, and each received encouragement and approval from plaintiff in error as they called to bid him good-bye. Forty-six or 48 went out of the Portland plant. Eight men went out of the office, all of them volunteers except one, and seven became officers. (183, 184, 224, 225.)

Plaintiff in error instead of obstructing enlistment or encouraging resistance to the United States as charged in the indictment, constantly advised the men in his employ to volunteer and to go as quickly as possible and fight for the United States, and assured them that as soon as they returned they would have their positions back, and if they needed anything while they were gone to let him know and he would help them all he could; in one instance he remonstrated with an employee who claimed exemption from service. (164-7, 171-2, 181, 187, 190-193, 224, 225.)

Notwithstanding the active support given by plaintiff in error and his manufacturing organization to the cause of the United States in the war, false rumors persisted that the American flag was not allowed to float upon or in the Albers Milling

Company plants, that they put ground glass in their flour, sold their Liberty Bonds, and generally were disloyal, to the humiliation of the officers and employees of the concern as well as plaintiff in error. (187, 188.)

Besides actively supporting the cause of the United States, as aforesaid, plaintiff in error was uniformly favorable to the United States; (165, 172, 183, 185, 192, 193, 194, 218.) Shortly before the incident complained of he expressed the opinion that Germany was defeated and that the war would end in the success of the Allies, and that such was the only sucessful termination of the war. (206-211.)

Plaintiff in error is a mild, kind, generous, agreeable man, except when heavily intoxicated. At infrequent intervals he over-indulged in intoxicating liquor and became violent and irresponsible, and upon becoming sober he does not recall what he says or does while drunk. (168-9, 195-6, 201.)

Upon October 7, 1918, plaintiff in error left San Francisco to come to Portland, Oregon, and to his home in Milwaukie, Oregon. He boarded the Southern Pacific train at Oakland, California, at about 10:30 o'clock P. M. At that time he was under the influence of liquor, and immediately went to his berth and retired. The car occupied by him was a combination sleeping and observation car, having a small wash-room about six feet square located between that portion of the car used for observation purposes and that occupied by the berths. This

wash-room was provided with a seat that would accommodate two persons. Plaintiff in error did not leave his berth until about noon on the 8th day of October, 1918, which occasioned some comment among the passengers. When he got up he went to the wash-room where he stayed the remainder of the day, drinking whiskey and holding no conversation or communication with anyone.

LOT Q. SWETLAND, a large property holder of Portland, testified in substance: That he was on the train and riding in the car occupied by plaintiff in error. He thought it was around about four o'clock (October 8th) he saw defendant. At that time he was intoxicated; so intoxicated that he could barely recognize witness. Witness attempted to talk to defendant at that time, and then withdrew, seeing defendant did not know who witness was. About an hour and a half or two hours afterwards, in the wash-room of the composite car, witness again saw defendant. At that time he should say defendant was drunk—intoxicated. Witness saw defendant again after he had dinner that night. Defendant's condition was the same as when witness had seen him before, or even more so. * * * He was in the wash-room, the smoking compartment of that car. Defendant was alone. That was the time defendant asked witness to have a drink. Later on witness saw defendant engaged in conversation in the wash-room. * * He came back and looked into the wash-room again, and

defendant was then asleep. He imagined that was around nine o'clock, between nine and ten he thought. (160-4.)

A man named L. E. Gaumaunt, a Special Deputy Sheriff of King County, Washington, was on the train riding in the same car with plaintiff in error. (100.)

About 6:45 o'clock P. M. on October 8, 1918, Frank B. Tichenor, a Deputy United States Marshal, boarded the train at Grants Pass, Oregon. After having his dinner on the train, Tichenor went to the observation car, where he saw plaintiff in error together with Gaumaunt in the washroom. At the time, plaintiff in error had a bottle of liquor sitting near him, which Tichenor told him to put up. Plaintiff in error paid no attention to the direction of Tichenor, except to mumble incoherently, whereupon Gaumaunt took the bottle and set it upon the floor in the corner of the wash-room. (83, 102, 105, 106.) Tichenor then went out of the wash-room, followed by Gaumaunt, where they had conversation to the effect that plaintiff in error was a pro-German. (83, 102.)

Tichenor then directed Gaumaunt, together with another passenger upon the train named Mead, to go in and find out what the plaintiff in error would say and try to find out who he was, and remember anything that was said. (83, 102.)

About this time the porter on the observation car, Richard K. Clark, realizing that plaintiff in

error had been drinking liquor all afternoon and evening and was very drunk, and that Tichenor, Gaumaunt and the others had surrounded him for unfriendly purposes, went into the wash-room and tried to get plaintiff in error to go to bed.

RICHARD K. CLARK testified in substance: That he saw Henry Albers at the Oakland pier at ten P. M. on the 7th of October, 1918. In his opinion defendant was about half drunk. About 11:30 defendant went to bed, and he did not see anything more of him until the next morning. * * Defendant got up about ten o'clock the next morning, he thought, about ten. From then on he was continually drinking whiskey. He saw those fellows getting around him after they left Grants Pass about 7:30 or 8:00 o'clock, somewhere around there, the night of October 8, 1918. Mr. Tichenor—Gaumaunt was the moving spirit in surrounding Henry Albers at that time. Gaumaunt was the leading one of the two. Mr. Albers had been drinking pretty heavy all day, and that evening after these men surrounded him witness knew the condition defendant was in and wanted to take his whiskey away from him; and so about nine o'clock went and tried to get Mr. Albers to go to bed, and he took his grip from the wash-room to his berth, and after this this man Gaumaunt came and said he wanted that grip. He said, "I want that grip." He says "There is something in it I want to get out of it." Witness said, "What do you want with

it?" He says, "Something in it I want to get out; something in there I want," and witness said, "What authority have you to want this man's grip?" He says, "Well, I am an officer." Witness said, "Well, you will have to show me if you are an officer," so in the meantime the Pullman conductor came along and witness says to the conductor, "How about this man; he claims he is an officer and wants this man's grip; what shall I do about it?" The conductor said, "Well, let him have the grip." In the meantime Gaumaunt showed witness some kind of a little badge. Witness didn't know what it said on it. Gaumaunt said that was his authority, he was an officer. He showed witness some kind of a badge. Gaumaunt didn't say anything at that time except that he wanted the grip, there was something in it. Later he said the only way to get a German to talk was to get him full, get him full of whiskey. When defendant went to bed he was stupified from drink. Witness put him to bed. After he got him down to the berth the brakeman helped him. Defendant wasn't able to take his clothes off when they put him to bed that night; he slept in his clothes. * * * He wasn't able to take his shoes off; slept in his shoes. Witness saw Mr. Tichenor making notes when he went and put defendant to bed. * * after he put defendant to bed, and after they had taken his grip back. He saw Tichenor making notes. He was making notes then, yes, sir,

writing it down. There was two or three of them with him, this man Mead and Gaumaunt and Mr. Kinney. Witness thought there was another man—three or four of them. Mr. Tichenor was writing it down and they were all around him. Witness thought they were giving the information and the writing was done by Mr. Tichenor. When these conversations were going on Tichenor was in a little hall right by the smoking-room listening. He was listening and peeping, peeping and listening, yes, sir. (174-180.)

At the direction of Tichenor, Gaumaunt and Mead together with Kinney and Bendixen, hereinafter mentioned, provoked and heckled plaintiff in error while drunk and irresponsible into making certain statements which constitute the basis of the first four counts of the indictment. The versions of the persons mentioned of the incident follow:

JUDSON A. MEAD: First saw Albers along near noon, October 8th. Did not see him again until evening. The first time he saw Mr. Albers in the smoker there was no one in there except this L. E. Gaumaunt. It might have been a little after eight o'clock. He thought Mr. Gaumaunt and Mr. Albers were engaged in conversation—knew they were in fact. * * When he went in there Mr. Gaumaunt and Mr. Albers were some little time—for some minutes, perhaps ten or fifteen minutes, didn't know exactly. The talk was all commonplace. Witness had been

talking to Gaumaunt previously during the day. He paid no particular attention, although he entered into some of the conversation, that is, in commonplace remarks. He didn't sit down in the smoking compartment; he was standing there. Mr. Albers was sitting down, and this Gaumaunt was half sitting down and half standing up, leaning back against something. * * * Every few minutes Mr. Albers made some remarks when there was nobody else talking. He says, "Well, I am a German and don't deny it; they will never lick the Kaiser, not in a thousand years; once a German always a German." * * * Something was said, some remark made he thought by this Gaumaunt, something concerning the war, and that was the time that Mr. Albers made these remarks. After he made these remarks he swung his arms—throwed his arm back some way, made some gesture with his arm, and started some kind of a recitation which witness thought was in German. As witness remembered it, he was using the words "sprechen," "Rhine," and "offen," and as he understood that sprechen meant speech for German he thought it was in German what he said. Didn't know. Didn't understand it, however, whatever it was. Don't speak German himself. That was all he heard just then. He got up and walked out of there. This man Gaumaunt introduced him to this man Tichenor at this time just outside of the smoking room. He did not remember

that he had seen Tichenor before that time on the train. Gaumaunt went outside at the same time he did, went there and introduced him to this man Tichenor. Then witness made notes of these remarks that Albers had made in his presence. Soon after, he went back into the smoker to see if he was going to make any more remarks of the same kind. He made notes of what he had heard in there, because Mr. Tichenor suggested that he might be called as a witness on that account. Tichenor suggested that he make notes of what he saw or heard, and he did so. Went out very soon after the remarks were made and put them down. Didn't think there was anyone in the smoking compartment when he went back, was not sure. Soon after he went in, someone else came in, but he did not remember who that was. He and Mr. Albers talked very little after he went back into the smoking compartment. There were a few commonplace remarks that he did not remember. Albers looked at him and says, "Do you play the game?" Witness said, "I play the oil game pretty strong." Albers then asked witness the second time if he played the game. Witness replied, "Nothing much but the oil game." Albers said, "You don't know what I mean; you are a damn fool." * * * He might have been there more than half, possibly an hour altogether, from the first to the last; but this conversation when he called him a damn fool was within a very few

minutes after he had engaged in conversation with him. * * Though he (Albers) was in possession of all his faculties, as a matter of fact he had been drinking considerably between the time of those first remarks and these latter remarks. From the first to the last he supposed defendant had had probably four or five drinks; didn't think Gaumaunt drank with him all the time, but was certain that he saw Gaumaunt drink at least twice. Took a drink with him once himself, one only. (67-81.)

FRANK B. TICHENOR: He went into the observation car and there wasn't any seats, some were standing, so he left his grip there and went into the smoking compartment and on into the lavatory. Didn't notice who was in there at the time. When he came out was when he first met defendant, but didn't know who he was until some time after that. Had never met him before. Defendant was seated in the smoking compartment. Wasn't doing anything at the time. Man was standing up. Afterwards found out it was Mr. Gaumaunt or Gaymant; didn't know how you pronounce it. Yes, had a conversation at that time with Mr. Albers. There was a bottle, a pint bottle, supposed to be liquor, setting near him, and he asked him where the cork was and to put it away. Didn't remember whether defendant answered him or not, but Mr. Gaumaunt took and set it down in the corner. Didn't know who Albers was at the time

and had never met any of the other witnesses. He then went out of the smoking compartment, went out into the hall. Shortly Mr. Gaumaunt came out to him and wanted to know if he was an officer, and he told him he was, and Gaumaunt told him there was a bad pro-German—some words to that effect—in there and that there was a man who was going to clean him. Witness had better take care of him, and witness told Gaumaunt to go get this party and bring him to witness. They had a little conversation about it. Gaumaunt brought Mr. Mead. Witness told them they could not get anywhere by going in and beating the man up and for them to go in and find out what he said and try to find out who he was, and to remember anything that was said. * * * He heard defendant say at one time—that is when Mr. Mead was in there, "Once a German always a German." Witness was standing by the corner on the outside later on—he didn't just remember who was in there at the time, but when some of the others were in there—Mr. Mead wasn't in at that time, when he said, "What right has this Government to tell me what to do." That is all witness heard. The next morning he phoned the United States Attorney's office and reported what was said and who the party was and all about it, and that he would be in that night. Phoned from Roseburg. When he last saw Mr. Albers he was seated in there. Witness saw defendant when

witness was in the compartment and when witness looked in there two or three times. Kind of looked through the curtain, but didn't pay much more attention. He left it to these other parties, because he could not go in and he could not stand there very long in this hallway because people were passing in and out and he would have to step back and it was crowding the passageway. * * He didn't see the man drinking, but he would judge the man had been drinking. He wasn't lying down, he was sitting up and witness could not tell, just only he would judge the man had been drinking, but he cannot say whether there was anything to indicate that defendant did not have command of his faculties and was not in control of himself. He spoke very distinctly. There wasn't any mumbling * * Gaumaunt told him that he was a Special Deputy Sheriff or something in King County, Washington. Gaumaunt came right out and asked him if he was an officer, and he told him who he was. * * Witness then asked Gaumaunt to go find this man that he referred to that was going to clean up Mr. Albers, as he was very angry about the remarks. These things happened before he ever got into the car and he told Gaumaunt to bring him to witness. He brought Mr. Mead. Then he told Mr. Mead that he could not get anywhere by going in there and beating up a man, for him to go in there and find out who it was and try to find out what

the man was saying and remember what he said, and had him put it down in his note book, anything that was said, so he could remember. Never heard that Mr. Albers had called Mr. Mead a damn fool. Mr. Mead and Mr. Gaumaunt went in there pursuant to that arrangement. Mr. Kinney was also brought to him. Didn't remember whether it was Mr. Gaumaunt who brought him or not, but some one brought him to him at the writing desk in the observation car. Mead and Gaumaunt had been in before that. Didn't know how long that was before he got connected up with Kinney. He knew Mr. Mead was in there when the first remark was made. When the last remark was made he was outside, he remembered, and someone else was in there. Didn't remember which one of them was in there at that time. It wasn't Gaumaunt that was in there. Gaumaunt did not stay there all the time. Yes, they brought him another man. Thought Mr. Gaumaunt brought him Mr. Bendixen. After quite a little persuasion Mr. Bendixen said that his—before that, why Mr. Kinney had told him that the party was Mr. Albers, then Mr. Bendixen was brought to him and he asked him to go in there and he said that he didn't like to go in. It placed him in a very embarassing position, that he had an uncle who was a stockholder in the Albers Company, and witness told Bendixen that he was a pretty poor American citizen to refuse to go in

there to find out anything that he could in this case, and then he consented and went in. Yes, Bendixen told him he was able to speak German. That wasn't exactly the reason for having him in there. He wanted more than two witnesses for the case. * * He understood the conversation was carried on in German after Bendixen went in there. Didn't hear it. He was back there at the desk, taking notes. (81-89.)

L. W. KINNEY: Didn't remember whether he went in there immediately after dinner; it was soon after. Did not have any conversation with him. Fifteen or twenty minutes later witness again went in, saw Mr. Albers there, Gaumaunt was with him, no one else. Went in there, sat down, and began talking to him. One of defendant's remarks was, "Once a German, always a German." They were asking him about the war when he made that remark. Another remark he made was "I served twenty-five years under the Kaiser." Witness said to him, "Do you mean to say you served twenty-five years under the Kaiser?" He then said, "Yes, I served twenty-five years under the Kaiser when I came to this country." He said, "All that I have got in this country since I came to this country—what do I get in this country? I get shit, shit, shit." He pounded his left hand on his knee. The defendant said that "if necessary, he could take a gun and fight right here," and still used his left hand on his knee. He also said that we

would have a revolution in between two to four years. At first he said two years, and witness checked him up on it, and he said, "No, not with in two years, but within two to four years." He also said, "Why should this country tell me what to do?" He also said, "They can't get me." He said that "he came to this country without anything, and that he would go away without anything if necessary." Witness made notes that night on the train. He went in and came out several times during these conversations with Mr. Albers. Made some notes in between. * * Yes, heard Mr. Albers say, "They can never lick the Kaiser in a thousand years; I can take a gun and fight right here if necessary, if I have to." Did not recall anything else. The things detailed did not all occur at one time. Conversation extended over approximately three-quarters of an hour, but Mr. Gaumaunt was there most of the time. There were others in and out, but didn't pay much attention to them, didn't know what part they heard. * * He engaged in conversation with Mr. Albers himself in regard to this war. It was a general conversation. He did not know what was said by him with reference to any of these statements that he claimed to have heard. Witness asked defendant how long he thought this war would last, and then things that he thought might interest defendant and himself. * * * Never remember seeing Mr. Bendixen until the first time

up to the Court buildings at the grand jury examination. Didn't talk to Mr. Mead. Mr. Albers' manner of uttering the language was comparatively clear; he had a cigar in his mouth a great deal, and there were some things that witness could not understand which he would like to know. He most centainly should think defendant had possession of his faculties and seemed to know what he was saying and doing. * * * Didn't talk to defendant about other matters besides the war, not that he remembered of. * * * Witness went in there and engaged in conversation with him; asked him about the finish of the war and what he thought that the Kaiser could do and what he was going to do, etc. No, sir, he didn't note down what was said to defendant. Yes, sir, noted down very carefully what defendant said to him because he had a right to, because witness was protecting the United States Government. Witness was a United States citizen and was looking for what he might hear in regard to disadvantage to the United States government. Any propagandist is unreasonable. By propagandist he meant a party who is doing work against the government in this country. After hearing those utterances he thought defendant was doing work against the government. * * * Witness certainly did act deliberately, with very great deliberation. * * * He had been in twice before, and defendant had said nothing to him. Most any

time he would engage a man in conversation for that matter for the United States government. He was not in the habit of associating with people under the influence of liquor unless he really had business. Before that he gave defendant no chance to say anything to him. Defendant did not say anything to him. After he had overheard this conversation he went down there and engaged defendant in talk, and it was after he had engaged defendant in talk that defendant said these things. * * * After it started he and Mr. Gaumaunt and Mr. Tichenor and Mr. Bendixen were getting together there that night in concert on this propagandist. * * * He spent that three-quarters on an hour to an hour and got what evidence he thought he needed and went to bed because he was sick all that day. * * * So far as he was concerned, the starting point was when he went in there himself, when he went in there to find out what he could hear. He had heard some people say there was a propagandist in there, and immediately went in. He overheard a conversation which was not addressed to him—he could not say between whom that conversation was—but after he heard it that became the starting point with him. He went into the car and had this conversation with defendant. After that he went out several times and put his notes down and went back again. He put his notes down of his own motion right away. The gentleman that he

talked with when he came out was Mr. Tichenor, after he came out of this room. Someone told him that he was an official of the Government, and he talked it over with him. Really could not say whether it was Gaumaunt told him Tichenor was an official; thought possibly it was Mr. Gaumaunt. Tichenor told him to get more evidence. Then he went back again, * * * and Tichenor remained on the outside. When Tichenor told him to go back, he went back. He should have gone back anyway. After he came out the second time he jotted down a lot more, and went back again and got some more in the third drive. Thought he jotted that down, if he remembered correctly. Didn't remember whether in the presence of Tichenor or away from Tichenor. Didn't think Tichenor told him to go back the second time. Can't remember that Tichenor told him to go back the third time. Didn't know why he should have known that if defendant had been in his right mind his going back three times would have put him on his guard, supposing that he had been the most arrant knave in the world, or propagandist, as he termed it. Didn't know why his repeated visits to defendant at that time would have told defendant there was something on there. No, he did not know that it was a fact that defendant was so drunk and the witness knew he was so drunk that defendant could not recognize him between the first and the second and third visits (89-99).

L. E. GAUMAUNT: When he first went in he noticed Mr. Albers and a man who he later learned was Mr. Bendixen. * * * He came in and took a smoke, and went into the toilet, and then came back out. Heard nothing particular that he can remember now. Went back the second time pretty close to eight o'clock to smoke. * * * Mr. Kinney was in there; he would not say he was sitting with Mr. Albers, though. He heard Mr. Albers make that remark about McAdoo, McAdoo being a son-of-a-bitch. Defendant didn't seem to be addressing anybody in particular. That was the only remark he heard him make. Defendant had been drinking. He believed there was a bottle there on the seat. Albers was sitting down. Defendant's speech about McAdoo was plain. Yes, sir, he heard it plainly. After that remark was made, he didn't participate in any conversation outside of asking Mr. Kinney who the man was, and didn't he think defendant had better be put to bed. This was right after he made this remark. Witness said this right in the room with Mr. Albers. Nothing else took place, except Mr. Kinney said he didn't believe in putting a propagandist to bed, or something to that effect; and witness asked Mr. Kinney if he knew who the man was, and he said he didn't. After that a gentleman by the name of Mr. Mead, he believed, that heard part of the conversation, that came in there and was going to whip de-

fendant, or something to that effect, and then Mr. Tichenor came inside to go to the toilet. He didn't know who Mr. Tichenor was at the time, but later found out it was Mr. Tichenor. Mr. Tichenor came in to go to the toilet, and when he came out he saw this bottle there and he said to Mr. Albers: "Put the cork in that bottle and put it away." Mr. Albers mumbled something; he didn't get what it was. Nevertheless, he didn't put the bottle away, and to avoid further trouble witness took the bottle down and put it away, put the bottle out of sight. Mr. Mead was getting very hot under the collar, and witness judged by that Mr. Tichenor was an officer, telling him to put the bottle away, and he followed out and asked him if he was an officer, and he said he was a Deputy United States Marshal, so witness told Mr. Tichenor what was going on in there. Witness said, "That old gentleman is going to be hurt; I think if you are an officer you had better take care of him," and Tichenor said, "Well, there is a better way of doing it," or something to that effect. And he, Tichenor, asked them to make notes of what was said, which they did. Witness returned to the smoking car then. Right at the time he thought there were two people in there when he returned. Defendant was talking about him being a German, "Once a German always a German." He also said, "I am a German and I don't deny it, and I am pro-Hun and my

brothers are pro-Hun." Well, he says he came to this country twenty-five years ago—twenty or twenty-five years ago— and thought that conditions in Germany were better than what they were in this country. He thought that this country wasn't as free as Germany. Witness didn't think defendant said anything about the Kaiser. He said something about him not serving in the German army. Defendant said that the United States could never lick Germany in a thousand years. Witness didn't write any notes of what he heard; no, sir, but brought them out and told Mr. Tichenor. Mr. Tichenor made the notes. Defendant said there would be a revolution in this country in ten years, maybe in two years, and maybe tomorrow. He said that a Yankee could never beat a German; the Yankees could never beat the Germans in a thousand years, something to that effect. Mr. Tichenor told him to report to the District Attorney, which he did. * * * He should say he went in and out of the smoking room during the time that he heard these statements he has related five or six times; seven times. Each time he came out and told Mr. Tichenor, so he could make notes of what was said. One time Mr. Tichenor was outside the curtain in the hall. The other times he was outside by the desk in the observation car. Yes, sir, Mr. Albers expressed himself vigorously. He pounded his knee (illustrating with his hands). Witness

didn't believe they asked him any questions outside the witness asked him to go to bed and the defendant told him to go to hell. That was about the only question he asked defendant that he could recall. * * * He didn't hear anything of the conversation between Mr. Bendixen and Mr. Albers at a quarter to eight o'clock. Went back the second time to smoke. Didn't believe defendant was talking to anybody that he could recollect when witness went there the next time. Had not drunk with him at that time. Later on in the evening took two drinks with defendant. At eight o'clock when he was in there nobody was talking to defendant. Witness did not engage in conversation with him. Mr. Tichenor came in about 8:05, or something like that. Didn't believe anybody was talking with defendant at that time. Witness was in sight of defendant. Defendant had his booze in sight when witness was talking with him. Mr. Tichenor went to the toilet and came out and lighted up a cigar, as near as he can remember, and Mr. Albers was mumbling something to himself. He didn't believe anybody knew what it was at that time, and Mr. Tichenor told him he would better put the bottle away, which he didn't do. The witness thought to avoid further trouble he would put it away. Defendant did not make any remark when Mr. Tichenor told him to put it away, not right there. He did when Mr. Tichenor went out. He said he knew that big son-

of-a—meaning bitch—was going to get him, or something to that effect. Witness sat there for a second and Mr. Kinney, he believed, was in there with him and Mr. Mead, and Mr. Albers made the remark about McAdoo, and Mr. Mead started to get hot under the collar and witness said to Mr. Kinney, "Mr. Kinney, we better get that old gentleman to bed." Witness figured he might be some labor man or someone else. Didn't know who he was. If they could avoid trouble by throwing him into bed, wanted to get him into bed and out of harm's way. Defendant wasn't sober; he had been drinking. He seemed to know what he was saying. He sat up straight. Witness had drunk lots but tried to keep people from knowing it. At that time he thought defendant was so that he knew what he was doing. Witness asked him—he believed he asked him himself to go to bed—and defendant told him to go to hell, or something to that effect. Witness showed defendant his star, didn't show everybody on the train his star. Told Mr. Tichenor what Mr. Albers had said about McAdoo being a son-of-a-B. Tichenor didn't say he knew who defendant was. Didn't tell Judge McGinn that he went down and said to Tichenor, "Do you know who that man is?" and Tichenor said, "Yes, I know who it is; it is Albers, and we have been watching him for two years." There is only one thing he heard them say, defendant had been under surveillance for

a year and a half. He believed that was Kinney. He wrote a letter to George Albers, brother of defendant, and tried to give it to the lady next door, but she would not accept it; left it at Mr. Albers' house, as follows:

November 12, 1918.

Mr. G. ALBERS:

This is something I don't like to do, but I can't help it; ever since I got mixed up in your brother's case, why I am losing most of my friends down here; I have been upholding him in all respects whenever I was asked about him; my wife also is against me and says if he is saved, why she will leave me; now if she wants to she is welcome to go tomorrow and the rest can go somewhere else. What I want to ask you is this, will your brother look after me after the matter is finished? I have a good job here and I am making big money. If he is saved, why I lose everything, which I cannot afford as I have nothing now only property which belongs to my wife. I am willing to sacrifice it all to save him if he will take care of me after it is all finished, which would be fine on his part. You asked me about when the case is coming up. I didn't think I should tell you, but I see your interest is in the business. Mr. Heeny, District Attorney, told me it would be either the 24th of this month or ten days later. Our chances are very good, I think. I told Mr. Heeny lots in my letter which the jury did not

ask me, and I think he has another viewpoint of the case. I am going to stay with him if they put me in jail; would like to see you, but figure it better not to.

Kindly burn this up as it means a lot to me at this time. Kindly let me know your view of this matter. Mr. McGinn told me everything would be O. K. when I told him I would have to leave Kent, so I thought I would ask you. I am a special deputy here, otherwise I would have been licked I guess.

Hoping everything will be O. K., I remain,

L. E. GAUMAUNT.

Excuse pencil as I am in a hurry and going to Seattle on business and thought it would be a good chance to bring this to your house myself.

He wrote the following letter to the United States Attorney:

Kent, Wash., Nov. 6, 1918.

My dear Mr. Heeney:

I have been very much worried since I came back from Portland in regards to the Albers case. I answered the questions asked me correctly, but there was other things happened which I was not asked, and I have been afraid that his attorney might ask of these happenings and I am not posted as to what I should do. You said you wanted Mr. Albers to have a fair trial and also the Government, and that has

also worried me. I will now tell you of some of things that happened. Not that I want to try and save him, but save myself from any further troubles. After I heard him make the remarks about McAdoo, I told him that he better keep his mouth shut and I told him I was an officer from the State of Washington, and he would get himself in trouble. Now Mr. Heeney, don't you think he must have been pretty drunk, otherwise he would have shut his mouth? The jury asked me how drunk he was, and I think it was my place to have told them then, but Mr. Tichenor told me to answer only what I was asked. Now I am asking you to advise me. Mr. Bendixen was talking to him in the early part of the evening, and never made any remarks to anyone in regards to Albers, although he knows Tichnor, I believe. So I went in the wash room and sat down and then the party began; it was late in the eve when I went to look for the fellow who was **who was** with him who later proved to be Bendixen. I don't know whether there is any personal feelings between Bendixen or Albers, only Bendixen said he had an uncle in the firm. I also heard some people say when I was at the hotel that Tichnor said if Albers was not found guilty he would throw his star in the lake and jump in after him, but I did not let them people know who I was. These are the things I think you should know, now that I care for Albers in the least, and if he found guilty

ask me, and I think he has another viewpoint of the case. I am going to stay with him if they put me in jail; would like to see you, but figure it better not to.

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it is due to you good judgment, and I think your the man to know it all. If these things I said will in any way interfere with what I said, why let me know, as I don't want to make a mess out of this. You said to tell the truth, which I am doing. But the jury did not ask me about this, so I said nothing, but since that time I have worried about these things and now I feel some better. If at any time you should want to let me know about this, why this is my address. If you don't remember me by name, you will remember me by the white sweater, as you called it.

L. E. GAUMAUNT,
c-o Ford Agency, Kent. Wash.

Kindly advise me as to what I should do in regards to this matter (100-115).

Not content with the utterances that Gaumaunt, Mead and Kinney were able to provoke from plaintiff in error in his irresponsible condition, Tichenor and Gaumaunt sought Bendixen who was able to speak German, and Tichenor peremptorily directed Bendixen to endeavor to obtain from plaintiff in error further statements to his injury by conversing with him in German. Gaumaunt, Mead, Kinney and Tichenor did not speak or understand the German language. Bendixen after slight protest obeyed Tichenor's direction. Counsel for plaintiff in error objected to the introduction of the testimony of Bendixen upon the ground that the indictment charged that the utterances attributed to

plaintiff in error were in the English language, and that proof that they were made in the German language was not admissible to establish the Government's case, which objection was overruled by the Court (121-124). Bendixen testified in substance:

> Got on the train at Grants Pass for the purpose of going to Roseburg, where he had some business to attend to. * * * When that train came it, the first thing he was forced to do was to go into the lavoratory, and as he came out this man, he didn't know who he was at the time, was sitting there, but that was the first time he saw him. Nobody at all was with him. He noticed by the smell of the room that defendant had had liquor, and he warned him as to having liquor in his possession, because he knew the United States—this man Tichenor, was on the train, because he got on the train at Grants Pass. * * * Yes, sir, he told Mr. Albers there was a Deputy United States Marshal on the train, and he told him if he had any liquor in his possession it would be a wise thing for him to get rid of it. Defendant looked up and says, "No, they won't pinch me." Witness said, "They are liable to, and I think you had better take precautions," and defendant turned around to him and said, "Oh, to hell with him," and went down in his grip and pulled out a pint bottle of whiskey and offered witness a drink. He didn't have any further conversation with de-

fendant at that time. He left the compartment or smoking room then. Later, fifteen or twenty minutes or so, he could not say as to the exact time, as they were talking (witness and a friend) a gentleman came up and asked his friend if he was the gentleman that had been talking to this man in the smoking car, and his friend said, "No." Then he asked witness, and witness said, "Yes, I have been talking to him," and so he said, "Mr. Tichenor would like to see you up here, he said he would like to talk to you." Witness said, "All right," and so he went up and then he met Mr. Tichenor the first time ever he had met him in his life. He was introduced to him. Mr. Tichenor then spoke to witness and said,—he asked me if this man had made any remarks, had made any seditious remark, and witness said, "No, not to me," and Mr. Tichenor says, "Do you know the man," and witness said, "No, I don't know who he is," and Mr. Tichenor said, "I will tell you, he has been making some very seditious remarks, and we think he is Mr. Albers, Henry Albers of Portland," and when he said that why witness said, "Is that so," and they spoke of the matter just casual, and so Mr. Tichenor said, "I would like to have you go in there and find out if he really is Henry Albers." Witness hesitated first because he told Mr. Tichenor, "That puts me in a very funny position, Mr. Tichenor; I have an uncle who is interested in that company of

which he is president." Witness kind of hesitated, and Tichenor reminded him that it was his American duty to go in there, and witness did not delay a moment after that, and he went right into the compartment there. When he was in the compartment before he didn't take any drink with Mr. Albers, and when he talked with Mr. Tichenor he had an understanding that if he went in there the chances were defendant would offer him a drink, and he didn't want that brought up against him if he should take a drink. He was very specific on that. Then he went in to Mr. Albers. * * * He introduced himself in German to him because he can carry on a conversation in German and he understood German. He had some conversation with defendant. Witness introduced himself and told defendant who he was, and told him he was Erwin Bendixen, and his uncle was Peter Bendixen, and defendant probably knew him. Defendant told witness that he did. He thought this Gaumaunt offered them a drink. That is the way it was. Then witness told defendant right out kind in a protective way—he said, "Henry, you have been making some serious remarks to these fellows around here." He said. "They are remarks that are going to go hard with you." Defendant turned around in a very emphatic way, and he said to witness, disregarding his warning and everything, he said, "Once a German always a German." He talked

to defendant in German entirely. When defendant talked to witness he said it in German to witness. He said, "Einer Deutsch immer Deutsch; Ich bien Deutsch im Herz." That is the way he put it to witness. Defendant made a remark about being an American, as he would say, on the outside. He said he was an American outside, but he said in his heart he was German. He gave witness this impression. That is the impression he wanted witness to have by the words he used. After witness had introduced himself, the first thing he did was to warn defendant. He told defendant that he had been making some very seditious remarks to these men that were there, and witness said, "It would go hard with you after making these remarks; are you sure you know what you are saying; are you sure you know what you are doing?" and defendant made the remark, he said he was German, he was nothing but German, always a German. He said it didn't make any difference to him how he expressed it, you might say, and he wanted to imply—this was in German—and he told witness that on the outside, to the outside world, why he was an American, but down in his heart he was a German, and when he made that remark witness knew that was a very seditious remark to make, and he said to defendant, "My goodness, you don't mean that?" He said, "You don't mean to say you would go to Germany and fight for the Kai-

ser?" Witness made that remark to him and defendant got up and said he would go back in the morning. He says he had served the Kaiser twenty-five years, and with America, shit, shit. That is just what he said to witness in German. Witness knew that much of the conversation. He didn't exactly remember. He warned defendant all the time. That is what he was doing, he was warning defendant against saying those things. Then defendant told—he raved on, you might say, and he told witness he had ten million dollars and he would spend every cent of it to lick America. Then also in this conversation he made the remark, which is a very bad remark in the German language, it was the remark "Schlach America." "Schlach America" in the German language, he takes the word "schlach" means to obliterate. It means to do anything to you against the country. When a man says "schlach" in German he means "schlach" you, he is going to get you. This is witness' translation and that is the way it appears to him. Then after he saw defendant was of that character and he didn't care what remarks he had made, and would make any threat on us, witness walked out of the compartment and went back to Mr. Tichenor and told him the things that had been said and Mr. Tichenor said, "Well, he has been saying that to all these men," and Mr. Tichenor said, "There must be some more to this." Defendant has been down in San

Francisco and he must have been conspiring down there, making a contract or something. Then he asked witness if he would not go back and see if he could get some more—some dope, as he called it, as to contracts or something defendant had been doing down in Frisco. Witness went at once and he talked to defendant and tried to talk to him about several different things and then asked defendant if he had had anything like that to do—had done anything like that, and he said no, he hadn't had anything to do like that. He said—he looked at witness, you know, out of the corner of his eye, like this, "Nein, nein." You understand that means, "No, no," and he would not talk any more. During his talk with defendant before that, there were one or two things that probably should be brought up in this case, in regard to that. After witness had introduced himself to him—why, he introduced himself in German, and defendant told him that in German, "Du bist ein ecte Deutscher,' or "You are a genuine German." Also during the conversation defendant told him that his brothers were also pro-Hun. Well, he said German, which means the same thing. He didn't say pro-Hun, he said German. He said they were German. He also told witness of some trouble, he knew of some trouble or revolution which would appear in the next ten years, yes, five years, yes, tomorrow, he said. After he told witness this "Nein, nein," or "No, no," then

defendant told witness that he wanted to go to bed, and he went up to the porter and told the porter that he wanted to go to bed. Then witness went to the rear of the observation car again. When he spoke about Germany winning this war he made the remark, "Wir haben Krieg gewonnen," that means, "We have won the war." He expressed himself that he was willing to go back, he was going back in the morning. He told witness he had ten million dollars and that he would spend every cent of it to whip America. Witness got off the train at Roseburg about an hour later. He reported to Mr. Tichenor what he had heard in that room and made a memorandum of it himself. * * He had one or two drinks with him, yes. He did not make any arrangements to drink with him before he went in there. He said naturally Mr. Albers would ask him to have a drink, and he wanted to know Mr. Tichenor didn't get him in wrong because he took a drink. That is what he told Mr. Tichenor. Mr. Tichenor told him it didn't make any difference to him. * * He went in there because when this man Gaumaunt came to him he showed him, showed them a Deputy Marshal's badge, and when witness went to Mr. Tichenor, why, he was among detectives, and he thought this was a kind of detective game and he made up his mind right then and there that probably these detectives, who are very zealous sometimes, were trying to put something over on

this man, and he went in there in that light and he even talked German to him to hear what he had to say to be sure he gave him a square deal on the thing (116-130).

None of the men thus engaged in baiting plaintiff in error was subject to military service, except remotely and none of them had ever offered himself for such service. Gaumaunt, Mead and Bendixen had all secured classification giving them the exemption from service allowed married men with dependents, Tichenor was an officer of the law, and Kinney was beyond the draft age (77, 81, 92, 100. 116, 250).

Defendant took the witness stand in his own behalf and denied any recollection of making any of the statements attributed to him by the witnesses, or seeing or talking to any of them. He testified that he never had to his knowledge made any statement or committed any act hostile or antagonistic to the United States, and protested his loyalty and attachment to the United States (217, 218, 223, 240, 243).

On the trial the Government was permitted over objection to introduce evidence of irrelevant, improbable and remote statements alleged to have been made by plaintiff in error in 1914 and 1915. These alleged statements were grossly prejudicial to plaintiff in error. They were offered for the avowed purpose of showing intent, whereas it was impossible for the requisite intent to be present or

even exist at the time it was testified the statements were made.

DAVID McKINNON, a witness for the Government, testified: He met defendant in San Francisco after the World War, and had the discussion concerning the war, two or three months after the war first started, in September or October or November, 1914, somewhere in that locality. They were standing at the corner of Sansome and California streets at the time this conversation took place. Then Henry Albers says to the witness, "What do you think about our British cousins?" Witness said, "No British cousins of mine; nothing British were cousins of mine." Defendant then said, "Never mind, before we get through with them we will kill every man, woman and child in England" (153-158).

HENRY CERRANO, a witness for the Government, testified: That he was born in 1879 in Italy; was naturalized January 2, 1915. His occupation is that of a janitor, cleaning windows. Had been cleaning windows about four years for Albers Brothers. Recalled hearing Mr. Albers make a statement concerning the war. That was before October, 1915. It was before October, because in the month of October he quit washing windows for Mr. Albers. He was just cleaning the windows in the office of the Albers Brothers Milling Company. He saw the de-

> fendant, Henry Albers, there in the office. Well, he saw Mr. Albers once. He came in the office with a German-American paper, and he gave this paper to a young gentleman who was working at a typewriting machine; and giving this paper he says, "Look at that paper, see what the German army is doing; the German army is doing wonderful, and France and England come very easy." And then Mr. Albers went away from that room, and then the only words I heard after that, I heard these two words, "One Kaiser and one God." He didn't understand well what defendant said before that we were going to have one Kaiser and one God, but he was sure of the statement, "One Kaiser and one God." He heard very well them two words (136-139).

The Government also called the witnesses Olga Gomes (130-136), G. M. Wardell (150-153) and N. F. Titus (143-145) to give testimony concerning statements alleged to have been made by plaintiff in error at other times. The last mentioned testimony was without probative force respecting the question of intent, and only served to confuse the issue and discredit plaintiff in error before the jury. It appeared that at the time testified to by the witness Gomes, plaintiff in error was virtually crazy as the result of a protracted spree, and was so drunk at the time that he did not know where he was or what he was doing. The alleged statements were made in a taxicab and addressed to nobody (196-200). Miss Gomes testified in effect that

plaintiff in error stated that he was a Kaiser man and muttered the phrase "Deutschland uber alles," and when he was told to shut up by one of the occupants of the taxicab he said, "I don't care; I am a spy; I am a spy, and I am ready to be shot right now for Germany."

The witness Wardell, an amateur detective, testified that plaintiff in error remarked that "when the Germans got well organized with the submarines there would be no chance for any boats to go across," and witness thought that plaintiff in error said in substance that he hoped they would blow every British ship out of the water. The statement was alleged to have been made at Wheeler, in Tillamook County, Oregon, some time in February, 1918. It appeared that plaintiff in error was at Wheeler at that time upon a patriotic mission—to secure an American flag to place upon a boat that he and John O'Neill were engaged in salvaging (200, 236).

The witness N. F. Titus was permitted to testify in effect that plaintiff in error while engaged in calm, rational discussions with the witness had stated on several occasions that the press of America was dominated by the English press, and that the people of the United States were thereby misled in their estimate of the Belgian and other atrocities, and that our entry into the war was influenced by the British press: that he liked the form of government in Germany better than he did over here, feeling that the forms of government here were

maybe swayed by party action, political action and selfish ends, and that the German forms of government were more efficiently, more ably and more conscientiously administered; that the people in Germany enjoyed life more than they did over here. They would go to church on Sunday morning and after church they could meet around at a little beer garden and sit around and play games and have a good time.

The jury in acquitting plaintiff in error upon Counts 5, 6 and 7 of the indictment affirmatively found that the utterances of plaintiff in error to the witness Titus did not show criminal intent, a conclusion that is at once apparent.

(Sandberg vs. United States, 257 Fed. 643.)

The record shows that the agents of the Department of Justice examined plaintiff in error's every step from 1914 until the time of the trial to discover the commission by him of any disloyal or unpatriotic acts or utterances, and found nothing (134, 152, 158, 226-230, 245, 246).

The Court imposed upon plaintiff in error the startling sentence of three years imprisonment in the penitentiary at McNeil's Island and a fine of Ten Thousand Dollars.

In the argument herein supporting the several assignments of error relied upon, such further notice will be taken of matters arising at the trial as may be required to illustrate and make plain the question presented for the Court's consideration.

SPECIFICATION OF ERRORS.

The errors relied upon by plaintiff in error are as follows:

I.

Error of the Court in overruling the demurrer of plaintiff in error to Count Three of the indictment, on the ground that the Act of Congress on which said count of the indictment is based is in violation of Article I of the Amendments to the Constitution of the United States.

II.

Error of the Court in overruling the demurrer of plaintiff in error to Count Four of the indictment, on the ground that the Act of Congress on which said count of the indictment is based is in violation of Article I of the Amendments to the Constitution of the United States.

III.

Error of the Court in overruling the demurrer of plaintiff in error to Counts Three and Four in the indictment, upon the ground that the facts stated in each of said counts of said indictment are insufficient to constitute an offense.

IV.

Error of the Court in overruling the demurrer of the plaintiff in error to Count Three of the indictment upon the ground that said count of the indictment is bad for duplicity.

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VI.

Error of the Court in refusing the request of the defendant to direct and instruct the jury to return a verdict of not guilty on Count Three of the indictment.

VII.

Error of the Court in refusing the request of the defendant to direct and instruct the jury to return a verdict of not guilty on Count Four of the indictment.

VIII.

Error of the Court in overruling and denying the motion of defendant for an order in arrest of judgment upon the verdict of the jury finding the defendant guilty as charged in Count Three of the indictment.

IX.

Error of the Court in overruling and denying the motion of defendant for an order in arrest of judgment upon the verdict of the jury finding the defendant guilty as charged in Count Four of the indictment.

X.

Error of the Court in overruling the objection of defendant to the testimony of the witness Erwin C. Bendixen, wherein he was asked the following question by the United States Attorney: "Question: Just go ahead in your own way, without questions from me, and tell what conversation you had with Mr. Albers at that time, or what he said to anybody else while you were present." And in permitting the witness to answer that defendant made the remark, he said he was a German, he was nothing but German, always a German. He said it didn't make any difference to him how he expressed it, you migh say, and he wanted to imply—this was in German—and he told witness that on the outside, to the outside world, why, he was an American, but down in his heart he was a German, and when he made that remark witness knew that was a very seditious remark to make, and he said to defendant, "My goodness, you don't mean that!" He said, "You don't mean to say you would go to Germany and fight for the Kaiser?" Witness made that remark to him and defendant got up and said he would go back in the morning. He said he had served the Kaiser twenty-five years, and that America—he said, "I have served the Kaiser twenty-five years, and with America, shit, shit." That is just what he said to witness in German. Witness knew that much of the conversation. He didn't exactly remember. He warned defendant all the time. That is what he was doing, he was warning defend-

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He said he looked at witness, you know, out of the corner of his eye, like that, "Nein, nein." You understand that means, "No, no," and he would not talk any more. During his talks with defendant, before that, there were one or two things that probably should be brought up in this case, in regard to that, after witness had introduced himself to him—why, he introduced himself in German, and defendant told him that—in German—"Du bist ein ecte Deutscher," or "You are a genuine German." Also during the conversation defendant told him that his brothers were also pro-Hun. Well, he said German, which means the same thing. He didn't say pro-Hun. He said German. He said they were German. He also told witness of sometrouble, he knew of some trouble or revolution which would appear in the next ten years, yes, five years, yes, tomorrow, he said. After he told witness this "nein, nein," or "no, no," then defendant told witness that he wanted to go to bed, and he went up to the porter and told the porter he wanted to go tobed;thenthewitness went to the rear of the observation car again. When he spoke about Germany winning this war he made the remark, "Wir haben Krieg gewonnen;" that means, "We have won the war." He expressed himself that he was willing to go back—he was going back—in the morning. He told witness he had ten million dollars and that he would spend every cent of it to whip America. Witness got off the train at Roseburg about an hour late. He re-

ported to Mr. Tichenor what he had heard in that room and made a memorandum of it himself.

XI.

Error of the Court in overruling the objection of the defendant to the testimony of the witness Henry Cerrano, and permitting said witness to testify, over defendant's objection, as follows: Before October, 1915, I saw Mr. Albers once. He came in the office with a German-American paper and he gave this paper to a young gentleman who was working at a typewriter machine, and giving this paper he says, "Look at that paper; see what the German army is doing. The German army is doing wonderful and France and England come very easy," and then Mr. Albers went away from that room and the only words I heard after that, I heard these two words, "One Kaiser and One God." I didn't understand well what he said before, if we were going to have one Kaiser and one God, or that we will have one Kaiser and one God, but, all what I am sure "One Kaiser and one God," I heard very well them two words.

XII.

Error of the Court in overruling the objection of the defendant to the testimony of the witness David McKinnon, wherein he was asked the following question: "Question: Just state the conversation that took place concerning the war." And in permitting the witness to answer that in 1914 he had a conversation with the defendant wherein defendant

said: "What do you think of our British cousins?" "Never mind; before we get throught with them we will kill every man, woman and child in England."

XIII.

Error of the Court in instructing the jury relative to the purpose and effect of the testimony sought to be elicted from the witness David McKinnon, while said witness was on the stand, as follows: "This testimony is offered, not to prove the acts that are alleged against him constituting the offense, but to prove or to show, if the testimony has that effect, the intent or not the intent but the bent of the defendant's mind or his attitude towards this country and towards that of Germans, and it will only be admitted for that purpose and none other, and it is admitted bearing upon intent so that the jury is put in possession of the bent of mind or of the attitude of the defendant prior to the time when these acts are alleged to have been committed, to enable them better to say what his intent was and by considering all the testimony in the case, and I will admit it for that purpose. I will say to the jury now that this testimony is not admitted for the purpose of proving the allegations in the indictment or any of them by which this defendant is charged with the offenses therein stated, but it is admitted for this purpose and this purpose only as tending to show the bent of mind of the defendant or his attitude towards this country as compared with his bent of mind and attitude towards the Imperial

Government of Germany, and is for the purpose of aiding you, taking it in connection with all the testimony that will be offered in the case, to determine what his intent was if it be proven that he has made the statements which it is declared by the indictment he has made, and by taking this in connection with all the testimony in the case it will aid you in determining what his intent was in making such remarks or in making such statements as may be proven to your satisfaction beyond a reasonable doubt."

XIV.

Error of the Court in overruling the objection of the defendant to the testimony of the witness N. F. Titus, wherein the defendant was asked the following question: "Question: Now, Mr. Titus, what conversation did you have with Mr. Albers concerning the war, commencing about January or February, 1917, and running up to June 15, 1917?" And in permitting the witness to answer that the conversations he had with Mr. Albers were numerous and he was unable to fix any definite day during that entire period when any particular conversation took place. He recalled very distinctly the nature and substance of the conversations, and, to begin with, the first point that came to the mind of witness was the discussion of Belgium and other atrocities, this topic arising from the current newspaper comments. In discussing those features, that particular point with Mr. Albers, he uniformly made

the statement that they were all lies and that the reason they got them in that shape was that the press of America was dominated by the English press, and that if we wished to get the truth of the situation we should read the German papers. He further discussed the trouble that the United States was having with Germany, the Imperial Government of Germany, respecting the various points at issue at that time, the exchange of notes which followed—and he believed—stated himself that the United States was misled in their position and the fact that they were misled was due to the influence of the British press and on numerous occasions emphasizing that point. Defendant frequently discussed the conditions in Germany, his visits over there, his great liking for the condition of living in Germany, the fact that the people there enjoyed life better than they do over here, and in discussing the life in Germany he frequently mentioned, or made comparisons between the institutions in this country and the institutions in Germany, laying particular emphasis on our forms of municipal government, speaking of our State government—its efficiency, etc., and in comparison of the national forms of government, and in every particular case in these comparisons emphasizing the point that he liked the form of government in Germany better than he did over here, feeling that the forms of government here were maybe swayed by party action, political action, and selfish ends and that the German forms of government were more efficiently and more ably

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and more conscientiously administered. That occurred along the first part of the year 1917 on numerous occasions. Defendant frequently mentioned at that time that the people in Germany enjoyed life more than they did over here. Well, the first thought that occurred to the mind of witness the first time defendant mentioned that was that he spoke of the convivial spirit of the people over there. He said they would go to a church on a Sunday morning. After church they could meet around at a little beer garden and sit around and play games and have a good time and he felt that the people there enjoyed life more than they did here. It was impossible, witness said, for him to tell whether these conversations took place in April, May, June or July, but the subject was up a number of times and defendant reverted back to the old primary consideration that defendant believed that we in this country were dominated by the British press. That seemed to be a particular hobby of his and he constantly referred to it and reverted to it, stating that we were misled by the British press and he felt that we were not justified in going to the length that we did in actually entering the war.

XV.

Error of the Court in overruling the objection of defendant to the testimony of the witness Eva T. Bendixen, wherein she was asked the following question: "Question: Now, what conversation was had at that time, if any, between Mr. Nippolt and

Mr. Bendixen and yourself concerning the Albers arrest or the Albers case or the charges against him?" And in permitting the witness to answer as follows: Answer: Well, the conversation came about regarding the case, and the fact that Henry Albers had made seditions remarks and that Mr. Bendixen had been asked to go in there and find out whether he really was a pro-Hun or not, and in regard to the matter about the drink it came up in this way: That he told Mr. Nippolt just how it came up, that he felt kind of, perhaps, that if Mr. Albers would offer him a drink it would be all right for him to take it; that he felt it was his American duty to go in there, if these remarks had been made, to see if it really was so; and he told also to Mr. Nippolt that it placed him in a very peculiar position because his uncle was interested in the firm and that his first thought was probably he should wire his uncle and then again he thought it would bring a reflection in some way or other; that he better leave just everything alone."

XVI.

Error of the Court in overruling the motion of the defendant to take from the jury and to strike out the testimony of the witness Horace A. Cushing as follows: He had a conversation with Mr. Albers in which defendant offered to make a bet with him concerning the outcome of the war. It was shortly after the Germans declared war against France and Great Britain. He offered to bet witness a thou-

sand dollars to fifty cents, and loan witness the fifty cents, that the Kaiser could lick the world.

XVII.

Error of the Court in overruling the motion of defendant to take from the jury and to strike out the testimony of the witness John H. Noyes as follows: Yes, sir, as he recalled it, he made only two bets with Mr. Albers with respect to the outcome of the war. The first bet was made in November, 1914. It was a bet of ten dollars that the Germans would not be in London in sixty days. Mr. Albers bet that the Germans would be in London in sixty days. He knew one other bet that he recalled. That was in December, 1915, that the war would be over April 1, 1916. Mr. Albers said the war would be over April 1, 1916. One of these bets was paid, he didn't know which. Both of them were for ten dollars.

XVIII.

Error of the Court in refusing to give the following instruction:

The mere utterance or use of the words and statements set forth in the several counts of the indictment does not constitute an offense in any of said counts. Before a defendant is guilty of violating the statute by oral statements such statements must be made wilfully and with the specific intent made necessary by the statute, and such words and oral statements must be such that their necessary and legitimate consequence will produce the results forbidden by the statute.

XIX.

Error of the Court in refusing to give the jury the following instruction:

While it is a rule of law that every person is presumed to intend the necessary and legitimate consequences of what he knowingly does or says, the jury, however, has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence thereof. A jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inference than to find any other fact without evidence.

XX.

Error of the Court in refusing to give the jury the following instruction:

If the defendant was intoxicated at the time of making any of the statements set forth in Counts 1, 2, 3, and 4 of the indictment, to such an extent that he could not deliberate upon or understand what he said, or have an intention to say what he did, you should find the defendant not guilty upon each of said Counts 1, 2, 3, and 4 of the indictment.

While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if upon the whole evidence in this case, by reason of defendant's intoxication (if you find he was intoxicated at the time), you have such reasonable doubt whether at the time of the utterance of the alleged language (if you find from the evidence defendant

did utter said language) that defendant did not have sufficient mental capacity to appreciate and understand the meaning of said language and the use to which it was made; that there was an absence of purpose, motive or intent on his part to violate the Espionage Act at the same time, then you cannot find him guilty upon Counts 1, 2, 3, and 4, although such inability and lack of intent was the result of intoxication.

XXI.

Error of the Court in refusing to give the jury the following instruction:

If the jury finds that the defendant made the statements alleged in Counts 1, 2, 3, and 4 of the indictment, and that such statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts 1, 2, 3, and 4.

XXII.

Error of the Court in refusing to give the jury the following instruction:

If you find from the evidence that F. B. Tichenor, a Deputy United States Marshal, and L. E. Gaumaunt, a deputy sheriff of a county in the State of Washington, induced and incited, or lured the defendant on, to make the statements charged in the indictment under the circumstances under which it has been testified such statements were made, and that said officers thereby procured the defendant to

make said statements, you should find the defendant not guilty upon each of the Counts 1, 2, 3, and 4 of the indictment.

XXIII.

Error of the Court in refusing to give the jury the following instruction:

E. C. Bendixen was produced by the Government as a witness to prove the charges set forth in Counts 1, 2, 3, and 4 of the indictment. You are instructed to disregard the testimony of said witness Bendixen for the reason that the testimony given by him does not tend to support the charges in said counts of the indictment.

XXIV.

Error of the Court in refusing to give the jury the following instruction:

Before you can find the defendant guilty under Count 3 of the indictment, you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements or the substance thereof alleged and set forth in that count of the indictment; second, that he made said statements wilfully and with the intention to incite, provoke or encourage resistance to the United States and to promote the cause of its enemies; and, third, that said statements, if you find beyond a reasonable doubt that any were made, would naturally and legitimately incite, provoke or encourage resistance to the United States and promote the cause of its enemies.

XXV.

Error of the Court in refusing to give the jury the following instruction:

Under the allegations of Count 3 of the indictment the Government must prove to your satisfaction beyond a reasonable doubt, before you can find the defendant guilty, that the defendant wilfully intended by the alleged statements both to incite, provoke and encourage resistance to the United States and to promote the cause of its enemies, and it will not be sufficient for the Government to prove that the defendant wilfully intended to bring about only one of such results.

XXVI.

Error of the Court in refusing to give the jury the following instruction:

The words "support," "favor," and "oppose" import wilfulness and intent, and it is alleged in the indictment that the statements set forth therein were made wilfully. Therefore before you could find the defendant guilty under Count 4 of the indictment, you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements as alleged in the indictment or in substance as alleged in the indictment; second, that the statements made by defendant, if you find beyond a reasonable doubt that he made any of the statements alleged, would naturally aid, defend and vindicate the cause of the Imperial German Govern-

ment with which the United States was then and there at war, and would also naturally, necessarily and legitimately hinder and defeat or prevent the success of the cause of the United States in said war; and third, that said statements,if any were made by the defendant wilfully and knowingly with intent to support and favor the cause of the Imperial German Government in said war, and oppose the cause of the United States therein.

XXVII.

Error of the Court in refusing to give the jury the following instruction:

Under the charge of Count 4 of said indictment the Government must satisfy you beyond a reasonable doubt that the defendant criminally intended both to support and favor the cause of the Imperial German Government and to oppose the cause of the United States in the war, and that the statements made, if any, would naturally produce both said results; otherwise you should acquit the defendant.

XXVIII.

Error of the Court in giving the jury the following instruction:

It is proper that I should instruct you as to what is meant by resistance to the United States as used in this law and in this charge. The other words in the law and in the charge are plain and were used and have been used, in my opinion, in the ordinary, every-day, common-sense meaning.

Resistance as a proposition of law means to oppose by direct, active and quasi-forcible means, the United States; that is, the laws of the United States and the measures taken under and in conformity with those laws to carry on and prosecute to a successful end the war in which the United States was then and is now engaged. Resistance means more than mere opposition or indifference to the United States or to its success in this war. It means more than inciting, provoking or encouraging refusal of duty or obstructing or attempting to obstruct the United States. The element of direct, active opposition by quasi-forcible means is required to constitute the offense of resisting the United States under this provision of the law and under this charge of the indictment. The offense, however, may be committed by wilfully and intentionally uttering language intended to promote the cause of the enemies of the United States without necessarily inciting, provoking, or encouraging forcible resistance to the United States. To promote means to help, to give aid, assistance to the enemies of the United States in the waging of this war. The cause of the enemies of the United States means any and all of their military measures taken or carried on for the purpose of winning the war against the United States. The cause of the United States as used in this act does not mean the reason which induced the Congress of the United States to declare a state of war between the United States and the Imperial Government of Germany. It does not mean the aims of the war in

the sense of the terms of peace to be imposed or the results to be accomplished or the time and conditions under which it is to be brought to a termination. In plain language, it means the side of the United States in the present impending and pending struggle. The words "oppose" and "cause" should be weighed and considered by you as limited to opposing or opposition to such military measures as are taken by the United States under lawful authority for the purpose of prosecuting that war to a successful and victorious determination.

POINTS AND AUTHORITIES.

I.

The character of every act depends upon the circumstances in which it is done. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Schenck vs. United States, 249 U. S. 47, 39 Supt. Ct. 247; 63 L. Ed. — (March 3, 1919).

Debs vs. United States, 249 U. S. 211, 39 Sup. Ct. 75, 252; 63 L. Ed. — (March 10, 1919).

Sandberg vs. United States, 257 Fed. 643.

II.

Every man is presumed to intend the necessary and legitimate consequences of what he knowingly does or says. The jury, however, had no right to find a criminal intent unless such intent was the necessary and legitimate consequence of the words spoken. A jury has no more right to draw an inference from words that do not necessarily and legitimately authorize such inference than to find any other fact without the evidence.

Von Bank vs. United States, 253 Fed. 641.

III.

A defendant cannot be convicted of a crime which was provoked or induced by a Government officer or agent and which otherwise would not have been committed.

United States vs. Lynch, 256 Fed. 983.

Woo Wai et al. vs. United States, 223 Fed. 412.

Voves vs. United States, 249 Fed. 191.

Sam Yick et al. vs. United States, 240 Fed. 60.

IV.

To render evidence of other similar acts or utterances admissible for the purpose of showing intent, they must in themselves and under the cir-

cumstances done or made tend to show or prove such intent.

United States vs. Schulze, 253 Fed. 377.

United States vs. Denson, Bulletin No. 142.

V.

The statements which it is claimed the accused made must be set forth in the indictment and the proof of the statements must correspond with the charge of the indictment.

Foster vs. United States, 253 Fed. 481.

Collins vs. United States, 253 Fed. 609.

VI.

Where it is charged that statements in the English language were made by the accused, such charge cannot be proved by evidence that the statements were made in the German language or in any foreign language. A fatal variance arises.

Stichtd vs. State (of Texas), 8 Am. St. Rep. 444 and note.

Zeig vs. Ort. 3 Pinney (Wis.) 30.

Wormouth vs. Cramer, 3 Wend. (N. Y.) 394, 20 Am. Dec. 706.

Schultz vs. Sohrt, 201 Ill., App. 74.

Kerschbaugher vs. Slusser, 12 Ind. 453.

3 Phillips' Evidence, page 551.

State vs. Marlier, 46 Mo. App 233.

Kunz vs. Hartwig, 151 Mo. App. 94.

Townshend on Libel and Slander, 4th Ed., Sec. 330.

VII.

Where the words are spoken in a foreign language, the original words should be set out in the indictment and an exact translation should be added. Giving the translation without the original, or the original without a translation, is not sufficient.

Newell on Slander and Libel, 3rd Ed., Secs. 325, 768.

Bishop's Directions and Forms, Sec. 619 and note at p. 358.

Bishop's New Criminal Procedure, Vol. 1, Sec. 564.

2 Phillips' Evidence, page 236.

Simonsen vs. Herold Co., 61 Wis., 626.

Pelzer vs. Benish, 67 Wis. 291.

Heeney vs. Kilbane, 59 Ohio St. 499.

Romano vs. De Vito (Mass.); 6 Am. & Eng. Annotated Cases 731 and extensive note.

Hayes vs. Nutter, 2 Am. Law Rep., and note page 365.

Odgers on Libel and Slander, 4th Ed., pages 119, 580.

Zenobio vs. Axtel, 6 Term 162, 9 Eng. Rul. Cases 87.

Cook vs. Cox, 3 Maul & Selwyn 110, 117; 9 Eng. Rul. Cases 89.

Rex vs. Peltier, 28 How. St. Tr. 529.

VIII.

The words should be charged as spoken. They should then be followed by a proper translation, and in this respect there is no difference between a civil and criminal prosecution.

State vs. Marlier, 46 Mo. App. 233.

Stichtd vs. State (of Texas); 8 Am. St. Rep. 444 and note.

Cook vs. Cox, 3 Maul & Selwyn 110, 117; 9 Eng. Rul. Cases 89.

IX.

It is presumed that the English language was used until the contrary is made to appear.

Heeney vs. Kilbane, 59 Ohio St. 499.

Kerschbaugher vs. Slusser, 12 Ind. 453.

X.

There cannot properly be said to be a communication of language by one to another unless that other understands the signification or meaning of the language said to be communicated. To one who does not understand the language in which a publication is made, it is to him nothing more than unmeaning sounds or signs and not language.

Townshend on Libel and Slander, 4th Ed., Sec. 96.

XI.

Where the utterances charged are made in a foreign language, it is necesary to prove that those who were present understood that language.

Newell on Slander and Libel, 3d E., Sec. 325.

Odgers on Libel and Slander, 4th Ed., pages 119, 580.

XII.

To charge a person with uttering slanderous words in the English language certainly does not inform the defendant that he will be required to meet and defend words uttered by him in a different language.

Stichtd vs. State (of Texas), 8 Am. St. Rep. 444 and note.

Wormouth vs. Cramer, 3 Wend. (N. Y.) 394, 20 Am. Dec. 706.

XIII.

If upon the whole evidence a reasonable doubt exists of a defendant's capacity to form the requisite criminal intent, he should be acquitted even though such inability is the result of voluntary intoxication, and the jury should have been so instructed in this case.

Davis vs. United States, 160 U. S. 469, 484, 487.

Hotema vs. United States, 186 U. S. 413.

Perkins vs. United States, 228 Fed. 408, 416.

United States vs. Chisholm, 153 Fed. 808, 810.

Post vs. United States, 135 Fed. 1, 10.

German vs. United States, 120 Fed. 666.

Stuart vs. Reynolds, 204 Fed. 709, 715.

McKnight vs. United States, 115 Fed. 972, 976.

Glover vs. United States, 147 Fed. 426, 431.

XIV.

Words spoken in sudden anger and without deliberation do not constitute a violation of the Espionage Act.

United States vs. Krafft, 249 Fed. 919.

United States vs. Dodge, Bulletin 202.

XV.

Where questions are aggressively put to a person and he is heckled into hasty and inadvertent utterances, the same do not constitute a violation of the Espionage Act.

United States vs. Dodge, Bulletin 202.

Rex vs Manshrick, 32 Dominion Law Rep. (Can.) 590.

XVI.

Where the statutory definition of an offense includes generic terms or embraces acts which it was not the intention of the statute to punish, the indictment must state species, it must descend to particulars.

United States vs. Cruikshank, 92 U. S. 542.

Batchelor vs. United States, 156 U. S. 426.

United States vs. Hess, 124 U. S. 483.

XVII.

An indictment or information charging two or more distinct and separate offenses in one count is bad for duplicity even though the offenses arise under the same statute.

14 Rul. Case Law, title Indictments and Informations, Sec. 40.

United States vs. Norton, 188 Fed. 256, 259.

32 Cyc. 376.

United States vs. Dembouski, 252 Fed. 894.

United States vs. American Naval Stores Co., 186 Fed. 592.

Maryland vs. United States, 216 Fed. 326.

Llewellyn vs. United States, 223 Fed. 18.

Ben vs. State, 58 Am. Dec. 234; note p. 239.

ARGUMENT.

The passion and heat engendered by the war gave this case undeserved prominence. By the prosecution, the press and Dame Rumor, plaintiff in error has been held up to the public as an active, wily and resourceful propagandist, possessing inordinate wealth and great capacity for injury to the United States, when in truth he is merely a dull, harmless American citizen of German birth; who, beginning with nothing, by hard work has acquired moderate wealth, and who had and has no capacity or inclination to harm the United States or aid its enemies; and who did more to promote the cause of the United States in the war than all his accusers together. He was in no sense a propagandist or agitator.

Plaintiff in error was proceeded against as though guilty of "high treason" when at most he was "drunk and disorderly." The influence of all

this upon the jury and the Court is reflected in the verdict against defendant and the grossly excessive punishment imposed. As said by a Canadian judge, "something is due to the dignity of the law" in these cases. In the case referred to Judge Stuart said:

> "Crankshaw in his notes to the Criminal Code mentions only four cases, between 1795 and the present time, of prosecution for seditious words, and they were all cases of public meetings and addresses. He says after speaking at length of seditious libel: 'with regard to seditious words they have on some few occasions, been made the subject of prosecution.' There have been more prosecutions for seditious words in Alberta in the past two years than in all the history of England for over 100 years and England has had numerous and critical wars in that time. The Napoleonic crisis occurred in that period. I do not wish to say anything which would repress the patriotic zeal of our public officials but we all have great confidence in the stability and safety of our institutions and of certain victory of our cause. In the circumstances I think something is due to the dignity of the law, and that the Courts should not, unless in cases of gravity and danger, be asked to spend their time scrutinizing with undue particularity the foolish talk of men in bar rooms and shops or a word or two evidently blurted out there impulsively and with no apparent de-

liberate purpose." (Rex vs. Trainor, 33 Dom. Law Rep. 658.)

Evidence Shows Criminal Intent Absent.

Error is assigned by plaintiff in error upon refusal of the Court to direct the jury to acquit defendant. (Specifiiation of Errors VI, VII, VIII, IX.) Thereby the question is presented whether the evidence warranted the jury in finding plaintiff in error guilty. Plaintiff in error earnestly contends there was an entire absence of evidence to establish the intent essential to conviction; that the evidence on the contrary showed the absence of such intent.

Count 3 of the indictment charges that the defendant made the statements on October 8th on the train, wilfully and with the intent (a) to incite, provoke and encourage resistance to the United States and (b) to promote the cause of its enemies. The language of the charge follows the language of the statute. It will be conceded that all of the prohibitions of the statute have reference to the Government's war activities and war measures or to the war measures of its enemies, and not to activi ties and measures unconnected with the war. It will also be conceded that the resistance here referred to is affected by the element of direct active opposition by quasi-forcible means to the war measures or war activities of the United States, and that to promote the cause of its enemies means to help and give aid or assistance to the war measures and war activities of the enemies of the United States

It at once appears that the intent to put in motion force or quasi force, as it is sometimes expressed, necessary to constitute the "resistance" referred to in the charge, could by no possibility be present.

The Supreme Court in a recent case arising under the Espionage Act, said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." (Schenck vs. United States, 249 U. S. 47; 39 Sup. Ct. 247; 63 L. Ed. ——; March 3, 1919.)

Measured by this rule, the evidence falls far short of establishing a case against plaintiff in error. Instead of creating a clear and present danger that they would bring about any of the substantive evils named in the statute, the words used by plaintiff in error under the circumstances could by no possibility have brought about any of such evils. There was no danger in the situation, and none to be apprehended, and everyone connected with the matter knew it.

To warrant conviction, the evidence must clearly disclose what war measure or activity of the United States was aimed at by plaintiff in error, or what war measure or activity of its enemies he intended to promote, and must point out wherein the

statements charged or the circumstances under which they were uttered disclose or show such intent. The use of words with any one of a large number of intents is prohibited by the section of the statute under consideration, all of which refer to war measures and war activities; but plaintiff in error could have entertained none of such intents other than those embraced in Count 3 of the indictment, as it cannot be said that Congress would more than once prohibit the same act done with the same intent in the same paragraph of the law. Necessarily the intents essential to conviction under Counts 1 and 2 of the indictment were not intended, for the jury found that they did not exist.

Section 3 of the Espionage Act as amended prohibits the making of statements with intent: (1) to interfere with the operation or success of the military or naval forces of the United States; (2) to promote the success of the enemies of the United States; (3) to obstruct the sale by the United States of bonds or other securities of the United States; (4) to obstruct the making of loans by or to the United States; (5) to incite or attempt to incite insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States; (6) to obstruct or attempt to obstruct the recruiting or enlistment service of the United States; (7) to abuse or profane (a) the form of government of the United States, (b) the Constitution of the United States, (c) the military or naval forces of the United States, (d) the flag of the United States,

(e) the uniform of the army or navy of the United States; (8) to bring the form of the government of the United States, the Constitution of the United States, the military or naval forces of the United States, the flag of the United States or the uniform of the United States into contempt, scorn, contumely or disrepute; (9) to incite, provoke or encourage resistance to the United States; (10) to promote the cause of the enemies of the United States; (11) to cripple or hinder the United States in the prosecution of the war by urging, inciting or advocating curtailment of production of products necessary or essential thereto; (12) the advocate, teach, defend or suggest the doing of any of the acts or things enumerated in Section 3 of the Espionage Act; (13) to support or favor the cause of any country with which the United States is at war; (14) to oppose the cause of the United States in the war.

The war activities and measures of the United States covered by Section 3 of the Espionage Act, and by necessity excluded from among the intents that plaintiff in error could have had in relation to the charge in Count 3 of the indictment, cover a large field and greatly narrow the war measures and war activities at which plaintiff in error might have aimed. Specific reference is made in the statute to the operation and success of the military and naval forces, to the sale of securities and obtaining of loans, to inciting or attempting to incite, insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces, to obstructing the

recruiting and enlistment service, and to the curtailment of production of war supplies. Possibly there were other war measures and war activities than those thus expressly defined by statute at which plaintiff in error might have aimed a criminal intent, but if so he is entitled to have the same pointed out and named, and a clear showing made as to how and in what manner the evidence discloses the same. A conviction cannot be sustained upon mere speculation or possibilities not defined by the evidence.

The rule of fairness and justice which demands that the prosecution produce evidence which clearly points out and defines the war measures that it is claimed defendant intended should be resisted, applies equally to the second clause of the charge in Count 3 of the indictment and to the charges in Count 4 of the indictment. This rule requires that the evidence should clearly and unmistakably point out and define the war measures of the enemy which it is claimed defendant intended should be prompted, aided, defended or vindicated, otherwise the jury cannot properly find the presence of the intent essential to conviction.

The second clause of the charge in Count 3 of the indictment charges plaintiff in error with making the statements attributed to him with intent to promote the cause of the enemies of the United Sates, reference being had to Germany; that is to say, with intent to aid and help Germany in its war measures and war activities against the United

States. Count 4 of the indictment charges in effect that the defendant made the statements wilfully and with intent to aid, defend and vindicate the military measures of Germany and to hinder, defeat and prevent the success of the military measures of the United States in the war between Germany and the United States. The utterances of plaintiff in error under the circumstances shown by the evidence would and did have the opposite effect upon his hearers, and would produce a result contrary to that accompanying the essential criminal intent, and consequently the jury was without evidence of intent and their verdict was contrary to the evidence.

The decision of this Court in the case Sandberg vs. United States (257 Fed. 643) is pertinent to the situation disclosed by the evidence in this case.

In the case of Von Bank vs. United States (253 Fed 641), the Circuit Court of Appeals for the Eighth Circuit, Judge Carland speaking for the Court, used language particularly appropriate to the situation here. He said:

> "The jury, however, had no right to find a criminal intent unless such intent was the necessary and legitimate consequence of the words spoken. A jury has no more right to draw an inference from facts that do not necessarily and legitimately authorize such inference than to find any other fact without the evidence.
>
> "The question now presented is, Would the

words spoken under the circumstances attending their utterance necessarily and legitimately cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces? If we presume, as we well may, the military and naval forces to be constituted of patriotic citizens, would not the words used by the defendant with respect to the flag when heard by them cause the flame of patriotism to burn the brighter in indignant protest rather than cause insubordination, disloyalty, mutiny or refusal of duty?

"It is not the language of the wily agitator or propagandist. The language used by the defendant is unpatriotic and offensive to any one who appreciates what the flag has always and still stands for; but if this be a government of laws and not of men, the defendant should stand unprejudiced by the passions of the times when charged with the commission of crime. * * * W are of the opinion, therefore, that there was no evidence from which the jury had the right to find or infer that the defendant used the language quoted above with the intent to cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States."

Neither was plaintiff in error an agitator or propagandist. He was not making a public address. and never had made one. There is no evidence in the case that he ever had at any time when sober

made a single statement or did a single thing indicating anything but the highest patriotic regard for the United States and its cause. The necessary and legitimate consequences of the words spoken by plaintiff in error under the circumstances attending their utterance here, like in the Von Bank case, were to cause the flame of patriotism in any good American citizen to burn the brighter in indignant protest rather than produce any of the results prohibited by the statute. The jury was not authorized to find a criminal intent present when all the evidence showed its absence.

Here we have a man advanced in years whose resources from the beginning of the war had been liberally used in promoting the war measures and war activities of the United States throughout the war. He was nominally at least the head of a large manufacturing concern doing business throughout the Pacific Coast. On the occasion in question he was vulgarly drunk in the smoking compartment of a Pullman car. Because he was free in distributing his liquor to those who came into the compartment, and spoke with a German accent, the witnesses called by the Government conceived the notion that it would be patriotic upon their part to ply him with questions concerning his attitude towards the war; and if his replies disclosed any German leanings to report him for prosecution. All admit that he was drunk, but the claim is made that he was not so drunk but what he was in possession of his faculties. To possess the intent essential to a violation

of the Act under the circumstances here disclosed, plaintiff in error necessarily would have some design and cunning and deep underlying purpose to effect material injury to the United States. The war had been in progress 18 months at the time. Prosecutions by the score had occurred under the Espionage Act. It was known that the Government had but to accuse to secure conviction.

Deputy Marshal Tichenor, when he found Albers in a drunken condition upon the railway car, might have arrested him for having his bottle of whiskey there, but instead of doing this he set about to systematically build up a case of another kind against him. Tichenor stood at the doorway listening and getting reports from those whom he sent in to make evidence. His zeal not only led him to urge strangers to aid in this job, but although from his first appearance upon the scene until the porter carried off the inebriate and put him to bed he knew that Albers was using whiskey and that these men were plying him with liquor, he was active in procuring foolish, maudlin and absurd utterances from the victim with the hope of finding something in them that could be used to make a case against him as an enemy of his country.

Mr. Mead, the first man to engage in conversation with him, was by him called a damn fool shortly after the conversation commenced, and he was so far along in his cups that he did not even notice the anger and resentment which the remark aroused in Mead. When Deputy United States

Marshal Tichenor told him to put away his bottle of liquor that he had in plain sight of everyone entering the smoking room of the car—a violation of Federal and State prohibition laws—he paid no attention to the direction but mumbled incoherently; and it was left to Gaumaunt, a Special Deputy Sheriff of the State of Washington, to put the bottle out of sight; and as Tichenor was leaving the smoking compartment, plaintiff in error applied a profane epithet to him, whereupon Gaumaunt showed him his badge and told him he, Gaumaunt, was an officer of the law and that Tichenor was a Deputy United States Marshal, and suggested that plaintiff in error had better go to bed, to which information and suggestion plaintiff in error said Tichenor couldn't get him and told Gaumaunt to go to Hell. Plaintiff in error was also blind to the scuffle Gaumaunt and the porter had over his grip and booze. At this juncture witness Kinney, in a burst of patriotic zeal, commenced insistently and hostilely to discuss the war with plaintiff in error, and every time he got an answer he rushed out, accompanied by Gaumaunt, and wrote it down and returned and indignantly continued the discussion, repeating the operation as many as six or seven times without arousing any suspicion on the part of plaintiff in error; and when plaintiff in error was approached by the witness Bendixen speaking German, "he just raved on." Promptly at the end of the session, plaintiff in error went to sleep and was carried to his berth by the porter and put to

bed with his clothes and shoes on.

At most the utterances of plaintiff in error were the protest and defy of a harried and heckled victim of hostile numbers. If the man could have by any possibility had in mind any intent prohibited by this statute, and by his utterances at the time under consideration was actually attempting to put that intent into effect, he should have been acquitted on the ground that he was insane, for no one but a crazy man would under the circumstances have endeavored to effect any such intent. Here were two officers of the law and two other men admittedly bitterly hostile to plaintiff in error, and one speaking German warning him that they were officers of the law he was talking to, as well as hostile citizens aiding them; and yet, it is claimed he was delivering himself of utterances with the intent prohibited by the statute.

The words attributed to the defendant instead of promoting any such intent were bound to have the contrary effect, to produce exactly the opposite result, which it is claimed was intended; and they did produce exactly the opposite result and the one they were bound to produce. It is absurd to say that a man competent and capable of forming and endeavoring to put into effect a criminal intent would do the things that any man with half sense would know would produce the opposite result.

If plaintiff in error could by any possibility have harbored any of the intents prohibited by the stat-

ute, either expressly or by inference, and contemplated putting the same into effect, he must have expected to use the persons addressed by him as instruments for accomplishing his evil intent. To do so he would hardly proceed at the outset to insult them, nor would he continue when he was warned, or discovered that they were preparing to destroy him. Moreover, had those in the hearing of plaintiff in error been passive or friendly instead of actively hostile, they would have been presumed to be loyal, patriotic citizens who would not be moved to disloyalty or hostility to the United States by the mutterings of a drunk man.

The evidence offered by the Government of collateral statements for the avowed purpose of proving intent added absolutely nothing to the Government's case upon the question of intent. None of such collateral statements had any tendency to establish any of the intents which it was incumbent upon the Government to establish beyond a reasonable doubt. They did not and could not supply intent to frantic and irresponsible utterances extracted by hostile hearers from a man far gone in drink. They did not and could not supply criminal intent in circumstances that no man in his right mind would attempt to bring about a result involving such intent. They did not and could not supply criminal intent to maudlin boasts made to and in the presence of officers of the law and in the face of imminent prosecution.

The contention that the criminal intent neces-

sary to a conviction under Counts 3 and 4 of the indictment as shown by the evidence and circumstances in the case is nothing short of absurd, and the motion for a directed verdict should have been allowed by the Court.

Heckling Directed by Government Officers Provoked Utterances, Hence No Offense.

With a view to establishing the basis of a criminal prosecution against plaintiff in error, officers of the law and those acting with them deliberately provoked him to make the utterances upon which this prosecution is founded. This entitled plaintiff in error to a directed verdict and it was error to refuse his request therefor (Specification of Errors VI, VII). "A defendant cannot be convicted of a crime which was provoked or induced by a Government officer or agent and which otherwise would not have been committed" (United States vs. Lynch, 256 Fed. 983).

It conclusively appears from the evidence that plaintiff in error had made no objectionable remarks on the entire trip, either to Lot Q. Swetland, the only man he knew upon the train, or to Bendixen, Gaumaunt or the others, until Tichenor got upon the train and proceeded to organize the witnesses mentioned for the purpose of making and recording evidence against plaintiff in error. The organization completed, they set upon him and enticed and heckled and provoked him into making

the utterances that are here contended violate the statute.

At the time plaintiff in error was verbally assailed by Deputy Marshal Tichenor and those acting with him, plaintiff in error had been upon the train over 20 hours. He had sought intercourse and communication with no one, but had devoted his attention wholly to the supply of liquor he had with him.

There were a thousand employees in the concern of which he had been president for more than 15 years. Many of these men had been in his employ for more than 20 years, and large numbers of them for many years, a fact which testifies to his standing as an employer. If he had any disposition to exert any influence against the United States and in favor of Germany, it would naturally be expected that he would bring it to bear upon some of these men, either directly or indirectly. Instead, however, 46 or 48 men, most of them volunteers, promptly joined the American forces upon the outbreak of the war, going from the plant where the plaintiff in error spent most of his time. Eight men went from his office, all but one volunteers, and seven of these became officers in the United States army. Practically everyone of such men was counseled and advised by plaintiff in error to join the military forces of the United States at once, and go and get the thing over with, and each and all were encouraged to believe that it would make better men of them; and their morale was promoted by the promise upon the part of plaintiff

in error that their jobs would be open to them upon their return, and in the meantime their dependents, if any, would be properly cared for. If there were any men in the United States that plaintiff in error had influence with and might have been able to induce or persuade to disloyalty, they were to be found among his employes, who had been with him for years and had received uniformly just treatment at his hands. Those employes who remained; that is, did not go to war, made a record of a hundred per cent in their contributions and subscriptions to every drive for funds, whether for Liberty Bonds or for war activities where the money subscribed was an outright gift. Each and every employee contributed or subscribed in each and every drive according to his or her abilities. The contributions of the Company of which plaintiff in error was president to war activities and relief funds included every organization engaged therein, and in the aggregate amounted to over $30,000.00. The subscriptions of the company to Liberty Bonds amounted to $300,000.00. Not one dollar had ever been contributed by plaintiff in error or his company to any German cause or activity, either before or after the United States entered the war.

Having in mind this record of the laudable support given to the United States in the war by plaintiff in error; that it was apparent to everyone that Germany was about to collapse, and did collapse within a month thereafter; that plaintiff in error never at any time uttered a word in discouragement

of the cause of the United States or calculated to promote the cause of Germany to a single one of the persons with whom he had some influence in the entire period of the war; that the men to whom he is said to have addressed himself consisted of a Deputy United States Marshal, a Special Deputy Sheriff and three civilians, two of whom were in Class 4 of the Selective Draft and the other above draft age; that none of these men had participated in the war in any way in the 18 months it had been in progress; and that they were all openly hostile to plaintiff in error; that he knew Tichenor and Gaumaunt were officers; that he was conscious that rumor had questioned his loyalty because of his German birth; it is humanly possible for plaintiff in error to have delivered himself of the utterances charged against him voluntarily or with any purpose prohibited by the statute, and equally impossible that such utterances could have produced any of the results the statute was designed to prevent.

It clearly appears from the testimony of the witnesses that the utterances of plaintiff in error made in the hearing and understanding of Tichenor, Gaumaunt, Mead and Kinney were provoked by remarks addressed to him by either Mead, Gaumaunt or Kinney. The manner of delivering the utterances, the substance thereof, show this. It is significant that none of these persons were willing to remember or testify to what they said to plaintiff in error to arouse him to express himself as he is said to have done. No witness testified that

he was engaged in an apparent effort to persuade his hearers to anything or to produce any conviction in their minds; but on the other hand it appears that he resented their efforts to communicate with him, and told Mead and Gaumaunt to go to Hell, and profanely referred to Tichenor, knowing that Gaumaunt and Tichenor were officers of the law. Such conversation as Kinney had with plaintiff in error consisted of a running exchange of retorts on both sides. Kinney refused to remember or testify to what he said to plaintiff in error, but admitted that he did go in there and deliberately, very deliberately set about to procure from plaintiff in error seditious utterances.

By the time Bendixen accosted him in German at the direction of Tichenor, plaintiff in error had become so wrought up by the badgering that Gaumaunt, Mead and Kinney had given him that, with the additional drinks he had taken, he was in a drunken frenzy and was beyond all restraint; and, according to the testimony of Bendixen, "just raved on," in spite of notice and warning Bendixen gave him that those about him were planning his destruction. Immediately when Tichenor and his aids ceased aggravating him, plaintiff in error fell asleep, and thereafter when put to bed by the porter and brakeman slept throughout the night with his clothes and shoes on.

The decisions of the courts which have considerered cases made by the activity and zealousness of Government officers and agents, establish the

principle that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case; that wherever the circumstances and conditions are such as to make it unconscionable for the Government to press its case, a conviction will not be upheld. Most, if not all, of the prohibitions of the Espionage Act are directed against the commission of verbal acts. To constitute a violation of the statute such acts must be accompanied by the criminal intent likewise prohibited by the statute. It has been pointed out that no criminal intent was or could have been present in this case. It is manifest that the verbal acts charged against plaintiff in error would not have been committed but for the action deliberately planned and carried out by Tichenor and Gaumaunt intended to and which did incite and provoke said verbal acts; that the plan of these two officers and their aids was carried out in spite of the fact that plaintiff in error was at the time so drunk that he was loudly cursing and swearing at every one who addressed him, and displayed complete want of responsibility. He made no statements of the character charged in the indictment before the plan of Tichenor to build up a case was initiated and put into effect, and made none after the heckling ceased. The action of these officers plainly and clearly incited, provoked and induced the alleged violation of the law, and without such action the verbal acts charged against plaintiff in error would not have been committed. There can be no claim

here that plaintiff in error planned or had in mind committing the alleged verbal acts, either with or without the intent prohibited by the statute, and that these officers were merely engaged in detecting the commission of crime conceived and planned by plaintiff in error; but on the other hand, it is plainly beyond any question of a doubt that none of the utterances charged against plaintiff in error would have been made but for the activities of these men. Surely a sound public policy requires that the Court deny the criminality of the plaintiff in error thus incited and provoked to give expression to the utterances charged against him, particularly when the utterances, after all, could by no possibility have produced any of the results which the statute is designed to prevent.

Inadmissible Collateral Statements.

As before mentioned, the Court allowed the Government to introduce in evidence for the purpose of showing intent, statements claimed to have been made by defendant at other times. (Specification of Errors XI., XII., XIII., XIV.) The alleged statements or their substance appear at pp. 40-43 of this brief. The acts made crimes by the Espionage Act are crimes only when the United States is at war. The war involved here is that between the United States and Germany. Judicial notice is taken that the World War commenced in August, 1914 and that in the United States scarcely any one supposed

it was possible for the United States to be drawn into the war until after it had been in progress more than two years. As between Germany and the Allies, many thousands of our citizens were pro-German, who when the United States entered the war eagerly took a patriotic stand against Germany and did their utmost to defeat her. Among these were the scores of Schmidts and Schultzes and Zimmermans and other German names that appeared in the long casualty lists of American soldiers.

The rule of evidence applied by this Court in the case of Rhuberg vs. United States (255 Fed. 865), is not questioned by plaintiff in error, but it is urged that the application of the rule and the admission under it of the testimony of the witnesses Cerrano and McKinnon was error which greatly prejudiced plaintiff in error upon the trial. The statements of these witnesses admitted in evidence tended to produce in the minds of the jury the idea that plaintiff in error harbored a brutal, bloodthirsty hatred of England and France, without havany any tendency whatever to establish in the least degree his attitude as between Germany and the United States in the war between them which began from one and one-half to two and one-half years after the alleged statements. The rule that other similar crimes or other similar acts are admissible to prove intent is not disputed. It is equally the rule, however, that such other similar crimes or similar acts must have some relation to the main

fact under consideration and have a legitimate tendency to establish the intent sought to be established, and must not be too remote. That they are similar is not sufficient, but the rule is that if they are relevant and material they are not inadmissible because they tend to show other offenses or tend to bring a defendant into disrepute. They are, however, inadmissible if their only result is to bring defendant into disrepute without having any tendency to establish the intent in question, and that is the situation here. The witness McKinnon was permitted to testify that plaintiff in error in a casual conversation in San Francisco had in the fall of 1915, said that "before we get through with them we will kill every man, woman and child in England." And the witness Cerrano was allowed to testify that plaintiff in error in 1914 said, "France and England come easy," and also muttered to himself, "One Kaiser and one God."

The testimony of these witnesses is highly improbable, and besides has not the remotest tendency to show that plaintiff in error favored the cause of Germany in the war with the United States entered into long thereafter as the result of disputes and controversies likewise arising long thereafter.

In the case of Hall vs. United States (256 Fed. 748), the Court had under consideration the admission in evidence of threats alleged to have been made by the defendant against the President of the United States. The case was one arising under the Espionage Act, and the indictment contained four

counts. Judge Pritchard, speaking for the Court, said:

"The introduction of this evidence would, of necessity, tend to create a false impression upon the minds of the jury, who would unconsciously reach the conclusion that one guilty of making such an unjustified attack upon the President must naturally be guilty of offenses wherein he was charged with being unmindful of the duty that he owed his country. The Circuit Court of Appeals for the First Circuit in the case of Thompson vs. United States, 144 Fed. 16, 75 C. C. A. 174, said:

'There is no occasion to question the general rule which excludes all evidence of collateral offenses. Such rule is often called the 'Rule of Logic,' because it is based upon the idea that evidence of the commission of one crime in and of itself has no legitimate tendency to prove the commission of another crime. This general rule in practice is, of course, more absolute when the offenses are of a different nature.'

"In the case of People vs. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, the court said:

'This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the

birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.'

"If this were not the rule, ther would be no guaranty for the life or liberty of the individual, and this would be especially true in time of war, as in this instance, when the government is involved, or on other occasions when public sentiment might be aroused as to a particular question."

If plaintiff in error made the statements testified to by the witnesses McKinnon and Cerrano, it is absolutely certain that the United States was not and could not have been in his mind. The intent sought to be established here has relation to the military measures of the United States against Germany, or the military measures of Germany against the United States, and no evidence is competent to establish that intent except evidence that has a legitimate tendency to show the same. At the time it is claimed plaintiff in error made the statements, no military measures as between the United States and Germany existed and none were in contemplation. Statements that are relied upon to establish intent must themselves disclose the intent it is sought to establish. (United States vs. Denson, Bulletin No. 142; United States vs. Schulze, 253 Fed. 377,

378; quoting Stephens Digest of the Law of Evidence.) Otherwise, evidence of the statements offered are irrelevant and immaterial to the issue. That is the reason of the rule that evidence of other crimes is not admissible to establish the charge of a specific crime; and likewise of the exception to that rule, that evidence of other acts having a tendency to establish the intent essential to the specific crime is admissible, notwithstanding it may show the accused committed other offenses. After all, the admissibility of evidence of collateral acts, whether they involve crime or not, is determined by the elementary rule of evidence that the same must be relevant. The rule is stated in Jones on Evidence in Sections 137 and 138:

> "The law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences.
>
> "Where there is such legitimate connection between the fact offered as evidence and the issuable fact that proof of the former tends to make the latter more probable or improbable, testimony proposed is relevant if not too remote."

Here the issue was the intent of plaintiff in error to materially aid Germany and materially hinder the United States in the war. Statements of plaintiff in error hostile to England or to England

and France in 1914 and 1915 would have no logical or visible tendency to prove that issue, and that is all the statements in question amounted to. If the defendant had been on trial for burglary, evidence that he beat and robbed a man at another time would not be admissible; yet, such evidence would have just as much tendency to establish guilt of the offense charged as the evidence of Cerrano and McKinnon did here. The dictates of justice and fairness required in this case, and in fact in all cases under the Espionage Act, that the rules of criminal evidence be strictly adhered to. The minds of people were inflamed by the stress of war, and the slightest evidence to the discredit of an accused was bound to be weighed heavily against him. All text-writers and all courts that have had occasion to consider the matter admonish the exercise of great caution in permitting the introduction of evidence of other crimes because of the tendency of such evidence to discredit and prejudice an accused person in the minds of the jury, resulting in undeserved conviction. Accordingly, the tendency of such evidence to prove the issue should be clear to render the evidence admissible. The universal caution referred to should have been applied in this case. While the evidence offered did not disclose the commission of another crime, it had all the tendencies of evidence of other crimes to discredit, injure and prejudice plaintiff in error. It pictured him to the jury as a bloodthirsty brute, exulting in the contemplated murder of the women and children of

England and France. It would be difficult to conceive of evidence more injurious and prejudicial in a case of this sort, and which at the same time was absolutely without probative force in the issue involved. There is a clear distinction between the evidence approved by this Court in the Rhuberg case and the evidence here complained of. In the Rhuberg case, although the collateral statements were made before the United States entered the war, they were made at a time when it was obvious that war would result between Germany and the United States, and at a time when the most bitter differences existed between the two countries. The statements were made at a time when an issue existed between the United States and Germany, and when men had occasion to take sides upon the issue and express their favor for one or the other of the two countries. Under those circumstances the evidence of collateral statements might have had some logical and visible tendency to establish the intent in question; but in this case the alleged statements were made at a time when there was no issue between the two countries, and when no such issue was thought probable or even possible; at a time when neither the plaintiff in error nor any other citizen of the United States was called upon to settle in his own mind the merit of any such issue or to take a position respecting the same. Hundreds of thousands of citizens of the United States who at the time these statements were made had a leaning toward Germany, immediately upon the occa-

sion of such an issue arising took the side of the United States and opposed Germany. No intent that the Government was required to prove, or any attitude or bent of mind, disclosing such an intent could have existed at the time the utterances were alleged to have been made; nor could such an intent have arisen until two or more years thereafter. The attitude of mind of plaintiff in error as between the United States and Germany concerning the war was material upon the issue of intent, and certainly that could not be established by evidence of the acts or statements of plaintiff in error made years before the circumstances occurred or the opportunity arose making it possible or necessary for plaintiff in error to adopt a mental attitude respecting the question. The evidence was clearly immaterial and irrelevant and highly prejudicial and injurious.

Statements in German Language Not Admissible to Prove Charge—Variance.

Error is assigned, based upon the admission in evidence of the testimony of the witness E. C. Bendixen, and also upon the instruction of the Court to the jury upon the admission of said testimony and the refusal of the Court to grant the request of plaintiff in error to direct the jury to disregard the testimony of Bendixen. (Specification of Errors X., XXIII.) The indictment sets out the statements complained of as having been made in the English language. It appeared that all of the statements

made by plaintiff in error to the witness Bendixen were made in the German language, and that Bendixen addressed plaintiff in error altogether in the German language, and that none of the other persons present understood the German language. Counsel for plaintiff in error objected to the introduction of the testimony of Bendixen because such testimony constituted a variance from the charge in the indictment and did not tend to prove any of the charges therein. That the testimony of Bendixen was inadmissible is sustained by all the authorities. That its admission was highly prejudicial is conclusively determined by the testimony itself. The rules of criminal pleading respecting the evidence admissible to prove the charge are precisely the same in all respects in espionage cases as in other criminal cases. Where a libel or a slander, or a seditious libel or slander, is uttered or published in a foreign language, the fact must be pleaded before evidence of the speaking or writing of the words is admissible. All of the text-writers, and all the decisions upon the question state the rule substantially thus:

> "Where the words are spoken in a foreign language the original words should be set out in the declaration and an exact translation should be added. In the case of slander an averment was formerly required to the effect that those who were present understood that language; and though such averment is no longer necessary the fact must still be proved at the trial, for if

words be spoken in a tongue altogether unknown to the hearers no action lies. * * Giving a translation without the original or the original without a translation, is not sufficient." (Newell on Slander and Libel, 3d Ed., Sections 325, 768. Odgers on Libel and Slander, 4th Ed., pages 119, 580. Bishop's Directions and Forms, Sec. 619, note at page 358, where an approved form is set out. Townshend on Libel and Slander, 4th Ed., Sections 96, 330. 1 Bishop's New Criminal Procedure, Sec. 564.)

Notice will be taken of some of the decisions.

In Stichtd vs. State (25 Texas Appeals 420; 8 Am. St. Rep. 444), the Court said:

"A novel question is presented in the record. In the information the alleged slanderous words are set forth in the English language. On the trial, over the objections of the defendant, the state was permitted to prove slanderous words uttered by the defendant in the German language, said words when interpreted meaning substantially the same as the slanderous words set forth in the information. The question presented is, when oral slander is alleged to have been committed by the use of the English language, can such slander committed by the use of the German language be proved, there being no allegation that the slander was uttered in the German language? We are of the opinion that the question must be answered in the negative.

In a civil action for slander, the rule is, that where the slanderous words were spoken in a foreign language, they must be set forth, together with a translation into English. To set forth the foreign words alone will not be sufficient. And to allege a publication of English words, and prove a publication of words in another tongue, is a variance: Townshend on Slander, Sec. 330.

"The reasons upon which the above stated rule is founded demand its application with equal if not of greater force in a criminal than in a civil prosecution for slander. In all criminal prosecutions the accused party has the right to be informed by the information or the indictment of the facts charged against him, so that he may prepare to meet them, and he can only be required on the trial to meet and defend against the exact matter charged against him. The allegation and the proof must meet, and substantially correspond, otherwise the accused might be convicted of a different offense than that with which he is charged, and which he had not been informed he was called upon to meet. To charge a person with uttering slanderous words in the English language certainly does not inform him that he will be required to meet and defend against words uttered by him in a different language. We hold that the court erred in permitting the state to prove the words uttered by the defendant in the German language, and

that the slander as charged in the information is materially variant from that proved."

In the case of Romano vs. DeVito, (191 Mass. 457, 6 Am. & Eng. Anno. Cases 731), the Court said:

"There is no doubt that when libelous words are written in a foreign language they should be set out in that language and a translation given. (Zenobio vs. Axtel, 6 Tr. 162, per Lord Kenyon, Chief Justice.) The same rule applies in the case of slander (Citing cases.) It is also necessary to prove that the translation of the foreign words in the declaration is correct. (Citing cases.) As there was no attempt to do this in the case at bar, the ruling of the judge below was right."

Wormouth vs. Cramer (3 Wend. (N. Y.) 394, 20 Am. Dec. 706) was a slander case. The words were set forth in the declaration in the English language. They were proved to have been spoken in the German language. The lower court granted a non-suit because of a variance between the pleading and the proof. Chief Justice Savage, speaking for the Court, said:

"The rule is that words proved must be proved as laid; that is, substantially so, and it is not enough to prove words of similar import. How can this rule be complied with when words are laid in one language and proved in another? This is emphatically proving words of similar import. The judge at the circuit was correct in

non-suiting plaintiff for a variance. The cases cited by defendant's counsel show that the proper mode of declaring is to state the words in the foreign language, and to aver the signification of them in English and that they were understood by those who heard them. (Starkie on Slander, 85, 308.) This was done in the case of Demarest vs. Haring, 6 Cowen 76, though no question on that point arose in that case."

Zeig vs. Ort (3 Pinney (Wis.) 30) was an action for slander. On the trial it appeared that the words charged in the declaration were spoken in the German language. The declaration set forth the words in English. It was proved that the words spoken by the defendant were understood by the persons who were present at the time they were uttered. A motion for a non-suit on the ground of variance was overruled. In an opinion by Justice Jackson the Court said:

"Two questions arise in this cause. First: Was there a material variance between the plaintiff's declaration and his proofs? Second: Was the declaration itself substantially defective? Both of these points must be settled by the weight of authority:

"First as to the question of variance. On this point there can be no question that since the leading case of Zenobio vs. Axtel, 6 Term 162, the uniform current of authority has been that where the slanderous words were spoken in a

foreign language they should be set out in the declaration in the original language with an English translation showing their application to the plaintiff. 1 Starkie on Slander, 324; 2 Phillips' Evidence 236; Wormouth vs. Cramer, 3 Wend. 394. * * In the case at bar the slanderous words alleged to have been spoken were set forth in the declaration in the English language. It was proven by all the witnesses on the trial on the circuit that the words were spoken in the German language. Here, according to the authorities which we have cited, was a fatal varience between the declaration and the proofs * *

"Second: Is the declaration defective in not averring that those who heard the slanderous words understood them? We have no doubt that such an averment is necessary where the words are spoken in a foreign language."

Schultz vs. Sohrt (201 Ill. App. 74) was an action for slander. The Court said:

"If the allegations and proofs do not substantially correspond, there is a fatal variance and the plaintiff must fail. 13 Enc. Pl. & Pr. 62. A verdict will not aid a count failing to set forth the words spoken. 25 Cyc. 472. There would be a fatal variance between the words alleged in English and proof of words spoken in German. On the second proposition we cannot see how a judgment recovered for slander for words spok-

en in English could be a bar to damages for words spoken in German."

Kerschbaugher vs. Slusser (12 Ind. 453) was an action for slander. The Court said:

> "Where the words were uttered in a foreign language the averment should be in accordance with the fact, setting forth the words in that language together with a translation thereof. If they are alleged as having been spoken in the English language, it will be a variance if the proof is that they were spoken in a foreign language. 3 Phillips' Evidence, page 551."

In the last case the Court in discussing the pleading further said: "There is nothing in the complaint by averment or otherwise that the words were spoken in any language other than the English."

State vs. Marlier (46 Mo. App. 233) was a criminal case wherein the defendant was indicted, charged with slander. The Court in reversing the case for failure of the lower court to sustain a motion in arrest of judgment, said:

> "The defendants are Belgians and it appears that the words were spoken in the French language in the presence and hearing of the Belgians. The case was tried by the aid of an interpreter. The indictment sets out the words in the English language, and omits to set them out in the language in which they were uttered. This was wrong. The words should be charged as spoken and in the tongue spoken. They should

then be followed by a proper translation. Zennobis vs. Axtel, 6 Tr. 162; Warmouth vs. Cramer, 3 Wend. 394; Kerschbaugher vs. Slusser, 12 Ind. 453; Hickley vs. Grosjean, 6 Blackford 351; Odgers Libel and Slander, 109, 110, 470; Newell on Defamation, Slander and Libel, 277, 637. And in this respect there is no difference between a civil and criminal prosecution. Cook vs. Cox, 3 M. & S. 110. The motion in arrest should have been sustained."

Kunz vs Hartwig (151 Mo. App. 94) was an action for slander. The Court applied the rules of pleading and of evidence approved by the court in the case of State vs. Marlier, supra. In its opinion the Court said:

"In actions of libel and slander where the defamatory words charged in the petition are written or spoken in a foreign language, the rule of pleading is that they must be set forth in the petition together with a proper translation of them. If the pleading alleges the words were spoken in the English language and the evidence shows that they were spoken in a foreign language, the variance is fatal. State vs. Marlier, 46 Mo. App. 233; 3 Enc. Pl. & Pr. 102."

In the case of Heeney vs. Kilbane (59 Ohio St. 499), in an action for slander, it was held that a charge that if the words were spoken in a foreign language there can be no recovery under a petition setting out slanderous words in the English language was correct. The Court said:

> "The words are set out in the petition in the English language. * * This is an English-speaking nation, and our courts and schools use that language, and the natural presumption is that English was used until the contrary is made to appear."

Zenobio vs. Axtel (6 Term 162, 9 Eng. Rul. Cases 87) was an action for libel. A motion in arrest of judgment was interposed on the ground that the original paper as written in the French language should have been set out in the count. Lord Kenyon, Chief Justice, said:

> "It is unnecessary to argue the other points if this objection be fatal; and that this objection must prevail is evident from the uniform current of precedents in all of which the original is set forth. The plaintiff should have set out the original words, and then have translated them showing their application to him."

In the case of Cook vs. Cox, (3 Maul & Selwyn 110, 117; 9 Eng. Rul. Cases 89), Lord Ellenborough, Chief Justice, expressly approved the rule of pleading and of evidence announced or established by Lord Kenyon in the case of Zenobio vs. Axtel, supra. Lord Ellenborough further said: "There must be no reason for any difference in this respect between civil and criminal cases."

On the trial of plaintiff in error the Court entirely lost sight of the rule of pleading requiring an appropriate charge or allegation to sustain the

admission of evidence. This is manifest from the instruction which the Court gave the jury at the time the evidence was offered. The Court said:

> "Now I cannot conceive that it was intended by this statute that the false reports should be made in any certain language. It may be made in English; it may be made in German; it may be made in Italian; but whatsoever language it is made in, it is false reports that come within the statute. * * The Government has tried to prove that that statute has been breached by words, and it is trying to prove now that the words were spoken in the German language, and it seems to me that the statute can be breached by the German language as well as by the English or Italian or any other language."

The Court made further observations of like import.

The Court was entirely correct in saying that the statute might be violated by the use of a foreign language accompanied by the essential intent, and that such violation might have been shown by evidence that a foreign language was used; but the Court entirely lost sight of the indispensable requirement that before such proof could be offered there must have been a pleading—in this case an indictment, setting forth that the violation occurred by the use of a foreign language, and setting forth the foreign words used together with a translation of their meaning into the English language. It

was not a question here of whether the statute could be violated by the use of a foreign language. The question was one of pleading and notice to the accused by a proper pleading of the offense he was required to meet. The pleading was insufficient to authorize the admission of the evidence under all the authorities. Before testimony that the utterances attributed to plaintiff in error could be introduced, the Government was bound to plead that they were made in a foreign language, and set forth a proper translation thereof in the English language, and before the evidence could be submitted to the jury the Government was further required to prove that the persons present understood the foreign language used. If all of the utterances of the plaintiff in error had been made in German and nobody present understood them, necessarily no offense was committed by him. The testimony of Bendixen was clearly variant from the charges in the indictment and inadmissible. It was clearly prejudicial. The Court was in error in admitting the testimony also in his observations as to the competency, materiality and relevancy thereof made before the jury. The Court also erred in denying the request of plaintiff in error to take said testimony away from the jury after the same had been admitted.

Intoxication Producing Reasonable Doubt of Capacity to Form Intent Justifies Acquittal.

Plaintiff in error requested the Court to instruct the jury as follows:

"If the defendant was intoxicated at the time of making any of the statements set forth in Counts 1, 2, 3 and 4 of the indictment, to such an extent that he could not deliberate upon or understand what he said, or have an intention to say what he did, you should find the defendant not guilty upon each of said Counts 1, 2, 3 and 4 of the indictment.

"While voluntary intoxication is no excuse or palliation for any crime actually committed, yet upon the whole evidence in this case, by reason of defendant's intoxication (if you find he was intoxicated at the time), you have such reasonable doubt whether at the time of the utterance of the alleged language (if you find from the evidence defendant did utter said language) that defendant did not have sufficient mental capacity to appreciate and understand the meaning of said language and the use to which it was made; that there was an absence of purpose, motive or intent on his part to violate the Espionage Act at said time, then you cannot find him guilty upon Counts 1, 2, 3 and 4, although such inability and lack of intent was the result of intoxication." (Specification of Error XX.)

The foregoing request was designed to guard the jury against an impression they might have that it was incumbent upon the plaintiff in error to satisfy them that he was so drunk at the time of making the utterances charged against him that he was

unable to form the criminal intent which was an element of the charge or charges against him; and further to clearly advise the jury that the burden was upon the Government to establish to their satisfaction beyond a reasonable doubt that plaintiff in error had the capacity to form the essential criminal intent, and that he had such intent at the time in question. In the case of Davis vs. United States (160 U. S., 469, 487), the Court said:

> "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crimes for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime."

Again, the Supreme Court in the case of Hotema vs. United States (188 U. S., 413), expressly approved the following instruction:

> "The burden is upon the Government throughout the entire case to prove every essential element of the case charged; and if you should have a reasonable doubt, taking into consideration all the evidence in the case, that the defendant Hotema was sane at the time of the commission of the act charged, you will acquit him."

The cases above cited and those cited in XIII Points and Authorities in this brief, it is true, are cases where the defense of insanity was interposed

by the defendant. However, the rule requiring the Government to prove every essential element of a criminal case to the satisfaction of the jury beyond a reasonable doubt prevails in every case regardless of the offense charged or the defense of the accused thereto. The burden was upon the Government in this case to prove to the satisfaction of the jury that ~~undisputed intoxication of plaintiff in error did not~~ the undisputed intoxication of plaintiff in error did not incapacitate him from forming the criminal intent required for conviction. Instead of giving the instruction requested, the Court directed the jury as follows:

> "Intent is an essential element in the perpetration of each of the four offenses charged against the defendant in these first four counts of the indictment. If the intent is absent, the defendant cannot be held accountable for what he is alleged to have done. Drunkenness is no excuse for the commission of a criminal offense, yet while this is the law, it is also the law that, where a specific intent is necessary to be proved before a conviction can be had, **it is competent to show that the accused was at the time wholly incapable of forming such intent, whether from intoxication or otherwise. In other words, it is a proper defense to show that the accused was intoxicated to such a degree as rendered him incapable of entertaining the specific intent essential to the commission of the crime charged.**
>
> "I therefore instruct you, gentlemen of the

jury, that, if the defendant was intoxicated at the time of making any of these statements which are set forth in Counts one, two, three and four, to such an extent that he could not deliberate upon or understand what he said, or form an intention to say what he did, your verdict should be not guilty. Otherwise, such a conclusion would not necessarily follow.

"This, as I have indicated, pertains to the first four counts in the indictment.

"It is common knowledge, however, that a person who is much intoxicated may nevertheless be capable of understanding and intending to utter the things that he is pleased to speak. And, as I have advised you, evidence of drunkenness is admissible solely with reference to the question of intent. **The weight to be given it is a matter for the jury to determine, and it should be received with great caution and carefully examined** in connection with all the circumstances in evidence in the case.

"You should discriminate between the conditions of mind merely excited by intoxicating drink, and yet capable of forming a specific intent and purpose, and such a prostration of the faculties as renders a man incapable of forming an intent. If the intoxicated person has the capacity to form the intent, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was too intoxi-

cated to conceive it readily by reason of his intoxication.

"You have heard the testimony relating to the defendant's alleged intoxication at the time, and you should consider the whole of it bearing upon the subject, coming from whatsoever source, and determine for yourselves the extent of the defendant's intoxication, if you find that he was intoxicated, and to what extent, if at all, it impaired his faculties, whether to the extent of rendering him wholly incapable of forming an intent, or whether his faculties were still left in such a condition as that he was yet able to think and reason, and to form a design of his own to do things upon his own account. If he was, then he would be amenable." (299-301.)

The Court will recall that the testimony of the intoxication of plaintiff in error came largely from the Government's witnesses, and that the extent thereof and his irresponsibility therefrom are plainly inferable from the nature of the utterances of plaintiff in error testified to by the Government's witnesses. It therefore became incumbent upon the Government, at the very outset of its case, to remove all reasonable doubt from the jury's mind that such intoxication deprived plaintiff in error of the capacity to form the required intent. This burden remained with the Government throughout the trial. The instruction given by the Court conveyed the erroneous direction that the burden was upon plaintiff in error to satisfy the jury that by reason of

his intoxication he was wholly incapable of forming the intent which it was the duty of the Government to prove beyond a reasonable doubt; and further, that the evidence in the case showing the extent of his intoxication and his want of capacity as a result thereof "should be received with great caution and carefully examined in conection with all the circumstances and evidence in the case." This direction by the Court relieved the Government of the burden of showing that plaintiff in error was capable of and did form the prohibited intents notwithstanding his intoxication. It improperly cast upon plaintiff in error the burden of showing he was wholly incapable of forming the specific intents, and heavily discounted the evidence in the case calculated to discharge that burden. There is no rule of law which requires the evidence and circumstances of a case tending to show lack of intent as a result of intoxication to be received or weighed or examined in any different manner than any other evidence and circumstances in a case. The direction of the Court to the jury that they should receive with great caution and carefully examine such evidence in this case was equivalent to telling the jury to view the evidence which showed absence of intent with suspicion and to give it scant weight. Some of the State courts cast the burden of proving defenses like insanity and intoxication upon the defendant, and some States—Oregon, for instance have statutes establishing such a rule; but that is not the rule in the Federal courts, as is clearly es-

tablished by the leading case of Davis vs. United States (160 U. S. 469, 487). Nowhere in the instructions did the Court direct the jury to the effect that if the intoxication of plaintiff in error created or raised a reasonable doubt in their minds as to the capacity of plaintiff in error to form the intent essential to conviction they should acquit him. Plaintiff in error was entitled to such an instruction as a matter of right, and it was error to refuse the same; the error was emphasized and aggravated by admonishing the jury to exercise great caution in receiving and weighing the evidence pertaining to the question of intoxication and its bearing upon the question of intent. The evidence could scarcely fail to raise a reasonable doubt in the mind of any ordinary man respecting the capacity of plaintiff in error at the time to form the prohibited criminal intent. Had the jury been directed that the presence of such a doubt in their minds required an acquittal, a different verdict might have resulted.

Criminal Intent Cannot be Found From Words Spoken Unless Such Intent is the Necessary and Legitimate Consequence Thereof.

Plaintiff in error requested the Court to instruct the jury as follows:

> "The mere utterance or use of the words and statements set forth in the several counts of the indictment does not constitute an offense in any of said counts. Before a defendant is guilty of violating the statute by oral statements such

statements must be made wilfully and with the specific intent made necessary by the statute, and such words and oral statements must be such that their necessary and legitimate consequence will produce the results forbidden by the statute." (Specification of Error XVIII.)

"While it is a rule of law that every person is presumed to intend the necessary and legitimate consequences of what he knowingly does or says, the jury, however, has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence thereof. A jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inferences than to find any other fact without evidence." (Specification of Error XIX.)

In the case of Von Bank vs. United States (253 Fed. 641), the Court said:

"Every man is presumed to intend the necessary and legitimate consequences of what he knowingly does or says. The jury, however, had no right to find a criminal intent unless such intent was the necessary and legitimate consequence of the words spoken."

This is the rule established by all the cases. It was important in this case that the rule mentioned be brought clearly to the attention of the jury, as it is extremely doubtful whether any of the utterances charged against plaintiff in error could by

any possibility produce any of the results prohibited by the statute, or were sufficient by the most strained construction to show any of the criminal intents referred to in the statute, even though the words had been spoken by a sober man in the presence of persons disposed to be friendly towards him. If this assumption is correct, the jury had no right to find that the words spoken established the necessary intent, and plaintiff in error was rightfully entitled to have the jury so directed. In the Von Bank case the Court further said:

> "A jury has no more right to draw an inference from words that do not necessarily and legitimately authorize such inference, that to find any other fact without the evidence."

In the case of Schenck vs. United States (249 U. S. 47, 39 Sup. Ct. 247; 63 L. Ed. ——; March 3, 1919), the Court said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The Court in the case at bar instructed the jury as follows:

> "In a case of this character, the jury may find from the facts and the circumstances, together with the language used, the intent, even though the intent was not expressed—directly

expressed. In other wards, you may infer the intent from the character and the natural, ordinary, necessary consequences of the acts." (Printed Transcript of Record, page 303.)

This instruction was incomplete in that it did not present to the jury the contention of plaintiff in error respecting the same matter. To properly and fully present the case and protect the rights of plaintiff in error therein, the Court should have added to his instruction at least the following portion of the request of plaintiff in error:

> "But the jury has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence thereof. A jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inferences than to find any other fact without evidence."

By the refusal of the Court to give the requested instructions just mentioned, the jury was deprived of a view and aspect of the evidence which plaintiff in error had a right to have them consider, presumably to the substantial prejudice of plaintiff in error.

A different verdict might have resulted if the jury had clearly understood that they could not infer criminal intent from the absurd babblings of plaintiff in error that, under the circumstances, could not possibly have had any of the consequences aimed at by the statute.

Words Spoken in Sudden Anger and Without Deliberation Do Not Violate the Act.

The evidence showed that plaintiff in error was in an angry frame of mind when expressing himself. The nature of his utterances—including those profane in character, clearly show that his hearers were aggressively engaged in promoting his anger. That the jury might be reminded that utterances made in sudden anger or hastily as the result of aggressive heckling do not violate the statute, plaintiff in error requested the following instruction:

> "If the jury find that the defendant made the statements alleged in Counts 1, 2, 3 and 4 of the indictment, and that said statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts 1, 2, 3 and 4." (Specification of Error XXI).

It is the duty of the trial court when seasonably requested to give to the jury appropriate instructions presenting for their consideration and guidance the rules of law applicable to the reasonable inferences and conclusions favorable to the accused which may be drawn from the evidence. Strict observance of this rule is indispensable to the protection of the liberty and rights of one accused of violation of the Espionage Act. During the war and at the time plaintiff in error was tried, an accusation was a long step towards conviction. That this was so was but natural. Yet, it emphasizes the ne-

cessity that every rule provided by law for safeguarding the rights of an accused be observed by the courts for his protection. General instructions defining the word "wilful" and the term "reasonable doubt" do not meet the requirement that the case of the accused be presented to the jury. It is the law that words uttered in sudden anger and without deliberation and utterances made hastily as the result of heckling do not violate the Espionage Act (United States vs. Krafft, 249 Fed. 919; United States vs. Dodge, Bulletin No. 202). The evidence was at least susceptible to the inference, if it did not conclusively show, as contended by plaintiff in error, that he was heckled and provoked into making the statements charged against him, and that they were made in anger and without deliberation. If the evidence had the effect indicated, it constituted a complete defense for plaintiff in error, and the jury should have been directed accordingly. The request under discussion was designed to advise the jury of one of the defenses in the case, and no general instructions not directed to that particular defense could take the place of it or avoid the error arising out of its refusal.

Count 4 Defective—Clauses of Statute Violate Constitution.

Count 4 of the indictment is predicated upon those clauses of the Espionage Act, as amended May 16, 1918, which provide as follows:

"Whoever shall by word or act support or favor the cause of any county with which the United States is at war, or

.. .. .. by word or act oppose the cause of the United States therein, shall be punished," etc.

These clauses of the statute are calculated to completely suppress discussion, the exchange of ideas or opinions, and the expression of differences respecting the progress or the outcome of this or any other war or the respective merits of the parties thereto. This enactment marks the extreme to which Congress has gone in setting aside the privilege of the citizen secured by the Constitution to freely express his opinions regarding matters of general public concern. It goes beyond any legislative provision yet upheld by the Supreme Court as within the power of Congress to enact legislation for war purposes. Some of the decisions go so far as to indicate that in time of war Congress has power to enact any provision which in its judgment is expedient or required to promote the success of the United States in the war. The indicated power is based upon the right of national self-defense, which, it is intimated, for the time supersedes all individual rights. This implied power, however, is insufficient to uphold the portion of the Espionage Act under discussion. There was at the time of this enactment no danger present or remote which threatened the United States as a government, or in any way endangered its territorial or other integrity. We were engaged in war on foreign soil.

There was in view not the remotest prospect that the integrity of the United States could be affected by the result of the war, nor its territorial extent and position disturbed in the slightest. If such a power may be exerted at all, surely its exercise can be called into action only when the national safety is actually threatened, and then the statute, it would seem, must be limited to the emergency it was adopted to meet. There is no authority in the Constitution, either express or implied, empowering Congress to suspend the guaranties of personal rights found in that instrument. The Supreme Court of the United States in the case of Ex parte Milligan (4 Wall. (U. S.) 2, page 120), said:

> "The Constitution of the United States is the law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."

While the powers of Congress to provide for conducting war are very large, yet they must be exercised in a manner to preserve all the individual rights secured and guaranteed by the Constitution. The exercise of a war power in a struggle against an enemy in a manner that violates rights guaranteed by the Constitution cannot be tolerated. Other-

wise, we may destroy ourselves while engaged in the attempt to vanquish our enemies. Whenever the situation arises that the ordinary powers of Congress cannot be exercised without impairing rights guaranteed to the citizen, the remedy is martial law, provided for by the Constitution to be exerted temporarily, and not the adoption of legislation which suspends or conflicts with the rights of the citizen. There is no exigency that can arise whereby Congress is authorized to provide legislation that will suspend for any length of time the rights guaranteed to the citizen by the Constitution. Congress itself is a creature of the Constitution and is bound to preserve all of the rights guaranteed by that instrument. In providing for the national self-defense, Congress must look to the Constitution for its power to employ the means to provide such self-defense. The nation in the exercise of the right of self-defense, like the individual, can only employ the means necessary to protect the right, and only when actual danger is imminent; and this Nation must exercise that right in the manner pointed out and provided by the Constitution. The Constitution does not authorize the adoption of statutes impairing and abridging personal rights as a means of providing national self-defense. If it be conceded that the power of self-defense may be exercised by Congress in the form of legislation having the effect of suspending individual or other rights secured by the Constitution, necessarily such legislation is limited to the adoption of special acts directed and con-

fined to a particular and immediate danger to the life of the Nation. The Espionage Act is not a special enactment, and no danger existed sufficiently serious or threatening to call into action any power upon which the above quoted provisions of the statute can be sustained. The statute is not confined to war with Germany, but applies to any war and for all time unless repealed. It applies to all future wars in which the United States may be engaged, whether with the most powerful enemy or with the weakest, whether for benevolent or high moral purposes or for aggression. If the statute is valid now it will be in the future, and will prevent discussion then as well as now regardless of the absence of danger or the possible national need of such discussion. The enactment does not square with the national character of the United States, or with the rights and immunities secured to its citizens by the Constitution. Under it the citizen in time of war may still differ with the Government mentally, but he cannot give intentional expression to his differences. It is only another step to inquisition and punishment for holding unexpressed opinions. It is submitted that the power asserted by the clauses of the statute referred to should be denied, as in effect was done by the Supreme Court in the case of Ex parte Milligan (4 Wall. (U. S.) page 2). It clearly violates the first amendment to the Constitution.

Counts 3 and 4 Defective—Charge Insufficient.

The very drastic character of the clauses of the

statute on which Count 4 of the indictment is based, and its broad and indefinite terms, necessitate resort to construction respecting the nature and quality of the expressions which may constitute its violation. It is a highly penal statute and demands a strict interpretation in the interest of the accused. The verbal acts aimed at by the statute naturally and perhaps necessarily contemplate only speeches, addresses, arguments, writings and the like deliberately made or circulated. A statute so all-embracing, not to say vicious, as the provisions under discussion, can hardly be properly construed to cover disconnected words and sentences or chance utterances blurted out without studied purpose. An examination of the indictment discloses that the words or statements plaintiff in error was accused of uttering do not constitute the character of utterances at which the statute was aimed. The utterances are wholly disconnected; most of them are without any clear meaning, and none of them have any capacity to support or vindicate the cause of the enemy or to constitute opposition to the United States. They do not in any sense arise to the dignity of debate or agitation, as charged in the indictment. They are charged to have been made upon a railroad train, and no showing is made and none could be made of the manner in which they could accomplish any of the things denounced by the statute. Consequently, Count 4 of the indictment does not state facts sufficient to constitute a crime.

The fourth count of the indictment charges that defendant, by making the alleged statements to and in the presence of the persons mentioned,

> "did by **word support and favor** the cause of a country with which the United States was then and is now at war, to wit, the Imperial German Government, **and oppose** the cause of the United States therein."

The charge sets forth two distinct and separate offenses in one count of the indictment, and is bad for duplicity. The clause of the statute provides:

> "Whoever shall by word or act support or favor the cause of any country with which the United States is at war or
>
> . . . . by word or act oppose the cause of the United States therein."

Here we have defined two distinct and separate offenses. The pleader proceeded upon the assumption that to support and favor an enemy by word necessarily at the same time opposed the cause of the United States; that to support and favor the enemy was but one step in an offense that was completed by opposing the United States. Some color might be given to the assumption if the statute had provided that whoever shall by word or act support or favor the cause of any country with which the United States is at war or oppose the cause of the United States therein. The statute then would have connected the crime of opposing the cause of the United States with the commission of the act consti-

tuting the offense. As the statute reads, however, a distinct separation is made between the acts which constitute the one crime and those which constitute the other. Most of the other offenses defined by the statute are aimed at specific physical results to flow from words used or statements made, and where a number of results are mentioned they are related to each other and are but successive stages in the progress of a criminal enterprise constituting as a whole but one offense, though either when done is an offense. That is not so with the clause under discussion. It aims at intentional support or favor of the cause of the enemy general in character and manifested by the use of language, and to intentional opposition to the cause of the United States likewise manifested. The statute is directed at affirmative utterances which directly support or vindicate the cause of the enemy, and at affirmative expressions in direct opposition to the cause of the United States in the war. The indirect inferences to be drawn from utterances and things not directly expressed therein, cannot form the basis of an indictment under these provisions. Neither crime defined is a part or element of the other. They are entirely separate and distinct. If a person intentionally and purposely uses words, some of which affirmatively express support and favor of the enemy cause, and some of which affirmatively oppose the United States in the war, two offenses are committed; the pleader cannot set them out as one offense of supporting and favoring the enemy and

opposing the United States. The pleader can set out the words and charge that the accused thereby supported and favored the cause of the enemy, in which case he must rely upon the clause of the statute pleaded; or he can charge that the accused thereby opposed the United States, where he must rely upon the clause of the statute pleaded. Or the pleader can include both charges in his indictment in separate counts and obtain the benefit of both offenses in making his case. But he cannot properly include them in one count as was done in this case. The commission of two or more offenses by the same act does not warrant the inclusion of more than one of such crimes in the same count of an indictment, unless they are all grades or steps of the same offense. Where the crimes are separate and distinct they must be separately pleaded even though they arise out of the same act or concurrent acts. The demurrer of plaintiff in error to the fourth count of the indictment should have been sustained upon all the grounds set up.

The rule of criminal pleading that where the statutory definition of an offense includes generic terms or embraces acts which it was not the intention of the statute to punish, the indictment must state the species, it must descend to particulars. applies to the clause of the statute applicable t Count 3 of the indictment. (United States vs. Bopp, 230 Fed. 723.)

Neither the Espionage Act nor any other act declares what is meant by the words "resistance to

the United States," or what would be required to constitute such resistance; so that, in giving effect to the statute, the Court must determine from other sources what Congress meant when it used the words. The indictment follows the language of the statute without amplification. There is no statement that defendant intended that certain things should be done, which if accomplished would in the judgment of the pleader constitute resistance to the United States; and upon the sufficiency of which things to constitute such offense, the judgment of the Court might be exercised. The argument of the Court in the case of United States vs. Bopp (230 Fed. 723, 726) applies with full force to the situation here, and what has been said concerning the words "resistance to the United States" applies equally to the phrase "cause of its enemies" used in the same count of the indictment. The things that it is claimed plaintiff in error expected to have done, and the war measures of the enemy he sought to forward, should have been described and set forth in the indictment in order that plaintiff in error might have notice of the charge against him and to enable the Court to determine whether the things to be done would naturally promote the success of the enemy. Count 3 of the indictment therefore does not state a crime, and the demurrer thereto should have been sustained.

Inadmissible Testimony in Rebuttal.

Error is assigned because of the admission over objection of certain testimony of Eva. T. Bendixen,

a witness called by the Government in rebuttal. (Specification of Error XV.) For the purpose of impeaching the Government's witness Erwin C. Bendixen, plaintiff in error called Wesley Nippolt as a witness, who, in answer to impeaching questios propounded to him, testified as follows:

> "On or about the 10th day of October, 1918, at the home of Mr. and Mrs. Bendixen, in this city, county and state, Mr. Bendixen stated these facts to witness: "I have fixed my uncle's stock plenty. You know Fred Jacquelin. Tell Jacquelin to get rid of his stock for it won't be worth much for a very great while longer," or words to that effect. And at that time Mr. Bendixen said to witness that he considered the entrapping of Henry Albers in this case as his bit towards the war, or words to that effect. Mr. Bendixen said at that time that before he would go into the room where Henry Albers was that he had an agreement with Mr. Tichenor, Deputy Marshal, by which he could drink as much whiskey as he wanted to without being charged with any criminal offense." (158, 159.)

To rebut the evidence of the witness Wesley Nippolt, the Government upon rebuttal called Eva T. Bendixen. Counsel for the Government propounded to the witness the impeaching questions that had been asked the witness Wesley Nippolt, and she answered the same in the negative. Thereupon counsel for the Government propounded to the

witness the following question:

> "Now, what conversation was had at that time, if any, between Mr. Nippolt and Mr. Bendixen and yourself concerning the Albers arrest or the Albers case or the charges against him?"

The question was objected to by counsel for plaintiff in error on the ground that the testimony sought to be elicted was hearsay, and upon the further ground that the witness having been called to meet impeaching testimony, and having met it by her negative answers to the questions propounded, it was improper to attempt to elicit from the witness testimony in support of the Government's direct case. The Court overruled the objection and permitted the witness to testify as follows:

> "Well, the conversation came about regarding the case, and the fact that Henry Albers had made seditious remarks and that Mr. Bendixen had been asked to go in there and find out whether he really was a pro-Hun or not, and in regard to the matter about the drink it came up in this way: That he told Mr. Nippolt just how it came up, that he felt kind of, perhaps, that if Mr. Albers would offer him a drink it would be all right for him to take it; that he felt it was his American duty to go in there, if these remarks had been made, to see if it really was so; and he told also to Mr. Nippolt that it placed him in a very peculiar position because his uncle was interested in the firm and that his first thought was probably he should wire his uncle

and then again he thought it would bring a reflection in some way or other, that he better leave just everything alone." (249.)

This constituted an attempt to corroborate and bolster up the testimony of Erwin C. Bendixen by hearsay testimony. It would have been inadmissible if offered in the Government's case in chief, and was equally inadmissible upon rebuttal. It was in no sense rebuttal testimony, and was not competent to meet the effort that had been made to impeach the witness Erwin C. Bendixen concerning specific statements Bendixen denied he made to Wesley Nippolt, and which Wesley Nippolt testified Bendixen did make to him in the presence of Mrs. Bendixen. Ordinarily the testimony given by Mrs. Bendixen of which complaint is made, might not be important, but taken with the very prejudicial nature of Bendixen's testimony and its entire inadmissibility, which has been pointed out, it constituted grave error.

While plaintiff in error was upon the stand as a witness in his own behalf, counsel for the Government asked him if he was not prone during 1914, '15 and '16, and until the early part of 1917, to bet anybody that wanted to bet as to the outcome of the war, and whether or not he did not bet with a man named Cushing. Plaintiff in error testified:

"He never put up a cent in his life about the outcome of the war. He never bet with Cushing. He only met Cushing about once, or two or

three times a year, maybe. He didn't think he ever asked Cushing to bet with him on this question" (245).

Counsel for the Government also asked plaintiff in error whether he knew Jack Noyes, and whether he made any bets with him about the outcome of the war, and whether he did not make a bet with Noyes in the Fall of 1914 as to the date when the Germans would arrive in Paris. Plaintiff in error testified:

"He knows Jack Noyes. Never made any bets with him about the outcome of the war; no. He was pretty sure that he never made a bet with Jack Noyes. No, he didn't think—it must be way back, but he didn't remember anything about it. It is so far back that he didn't know that he ever did make a bet with Noyes in the Fall of 1914 as to the date when the Germans would arrive in Paris. He might have, he would not say. He would not say that for sure, that he did do it. If he made any bet with Noyes along that line it might have been favorable to the Germans, with a view of the Germans winning. He didn't know. If he made this bet with Noyes he didn't know whether it was after the invasion of Belgium. He didn't recollect that at all. If he made any bets with Noyes he could not remember whether they were made after Belgium was invaded in 1914. He could not remember that far back" (245-246).

With a view to impeaching plaintiff in error, the Government in rebuttal called Horace A. Cushing as a witness, who testified:

> "He had a conversation with Mr. Albers in which defendant offered to make a bet with him concerning the outcome of the war. It was shortly after the Germans declared war against France and Great Britain. He offered to bet witness a Thousand Dollars to fifty cents and loan witness the fifty cents, that the Kaiser could lick the world" (254).

For a like purpose, the Government called Jack Noyes as a witness in rebuttal, who testified:

> "Yes, sir, as he recalled it he made only two bets with Mr. Albers with respect to the outcome of the war. The first bet was made in November, 1914. It was a bet of Ten Dollars that the Germans would not be in London in 60 days. Mr. Albers bet that the Germans would be in London in 60 days. Witness knows one other bet that he recalls, that was in December, 1915, that the war would be over April 1, 1916. One of these bets was paid. He didn't know which one. Both of them were for Ten Dollars. Mr. Albers lost, of course" (255).

The witness Noyes followed the witness Cushing upon the stand, and at the conclusion of the testimony of the witness Noyes, counsel for plaintiff in error moved the Court to strike out the testimony of Mr. Noyes and of the witness Cushing for the

reason that it was immaterial and an attempt to impeach upon an immaterial matter, which motion was denied by the Court. Plaintiff in error merely denied recollection of making any such bets, and therefore the attempt to impeach him concerning the same was improper. This was but a round-about way taken by the Government to bring before the jury irrelevant and prejudicial matter, and the testimony should have been stricken out upon motion therefor.

CONCLUSION.

At another time the incident out of which this case arose would have been regarded as unimportant and trivial. The words the accused was heckled into speaking while irresponsibly drunk would have occasioned merely derision and disgust. Even at the time no importance would have been attached to the matter by anyone but a Government officer and those excited by his activity and directions. Sensational newspaper stories following and based upon official version of the incident soon inflamed the public mind against plaintiff in error to such a degree that his indictment and conviction were inevitable. The imposition of a sentence so excessive and so disproportionate to the circumstances of the case violates the spirit at least of Article VIII of the Amendments to the Constitution which provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." A case wherein so harsh a

penalty is inflicted for the utterance of idle disconnected words by a man far gone in drink calls for the closest scrutiny by the Court to determine whether all of the rules provided for the protection of an accused have been strictly and exactly observed in the trial, and if any of them have not been so observed the conviction should be set aside. No liberality should be indulged respecting the proceedings by which has been obtained a conviction and harsh judgment under circumstances such as this case presents. The conviction should be set aside and the cause reversed upon any one or all of the errors specified.

Respectfully submitted,

CHARLES H. CAREY,
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Attorneys for Plaintiff in Error.

STATE OF OREGON,)
County of Multnomah,)

Due service of the foregoing Brief of Plaintiff in Error is hereby admitted this 6th day of October, 1919, by receiving a copy thereof, duly certified to as such, by John McCourt, one of the Attorneys for Plaintiff in Error.

Chas. J. Francis

Assistant United States Attorney.

No. 3385

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY ALBERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the District of Oregon.

BERT E. HANEY,
United States Attorney for Oregon.
BARNETT H. GOLDSTEIN,
Assistant United States Attorney for Oregon.

No. 3385

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FOR THE NINTH CIRCUIT

HENRY ALBERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the District of Oregon.

BERT E. HANEY,
United States Attorney for Oregon.
BARNETT H. GOLDSTEIN,
Assistant United States Attorney for Oregon.

STATEMENT

The indictment in this case is drawn in seven counts. The first four counts are based upon the Act of Congress approved May 16, 1918, which is an amendment to the original Espionage Act of June 15, 1917; and the last three counts are predicated upon the original Act. The jury returned a verdict of "guilty" as to Counts Three and Four of the indictment and "not guilty" as to the remaining counts. The issue is, therefore, narrowed down to the construction of Counts Three and Four and to the determination as to whether there is any error in the record upon which the jury based its verdict of "guilty" thereon.

COUNT THREE charges that the defendant, on October 8, 1918, while traveling as a passenger upon a Southern Pacific Railroad train, enroute to Portland, Oregon, and at a point between Grants Pass and Roseburg, Oregon, did wilfully utter language intended to incite, provoke and encourage resistance to the United States and

to promote the cause of its enemies, by stating to and in the presence of L. W. KINNEY, L. E. GAMAUNT, J. A. MEAD, E. C. BENDIXEN, F. B. TICHENOR, and others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, to-wit:

1. "I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser (meaning William II, German Emperor) and I would go back to Germany tomorrow."

3. "I came here (meaning the United States) without anything and I could go away without anything."

4. "I came to this country (meaning the United States) supposing it was a free country but I find that it is not as free as Germany."

5. "McAdoo (meaning W. G. McAdoo, then and there Secretary of the Treasury of the United States) is a son-of-a-bitch. Why should this Government tell me what to do?"

6. "I am a pro-German; so are my brothers."

7. "A German can never be beaten by a Yank (meaning an American)."

8. "You (meaning the United States) can never lick the Kaiser (meaning William II, German Emperor)—never in a thousand years."

9. "There will be a revolution in this country (meaning the United States) in ten years—yes, in two—maybe tomorrow."

10. "I could take a gun myself and fight right here (meaning in the United States."

11. "To hell with America."

12. "I have helped Germany in this war, and I would give every cent I have to defeat the United States."

13. "We (meaning Germany) have won the war."

COUNT FOUR charges the defendant with having wilfully made the statements above set out with the intent to support and favor the cause of Germany and to oppose the cause of

the United States therein.

In both of these counts it is alleged that the statements so made by the defendant were made at a time when the United States was then at war with the Imperial German Government.

To each of these counts in the indictment, the defendant demurred, which demurrer was overruled. The demurrer challenged the sufficiency of Counts Three and Four, upon the following grounds:

1. That said counts did not state facts sufficient to constitute a crime against the laws of the United States.

2. That said counts are duplicitous.

3. That said Act of Congress is unconstitutional.

At the close of the testimony, a motion was made by the defendant for a directed verdict, which motion was denied.

The defendant seasonably excepted to the overruling of his demurrer, to the denial of his motions; as well as to the admission of statements made by defendant at other times than the occasion charged in the indictment; and to

the failure of the court to give certain requested instructions—all of which rulings are assigned as error.

It might be noted at the outset that the defendant in his statement practically concedes the making of the utterances attributed to him in the indictment, but contends that he was "heckled" in the making of them, while in a drunken stupor. These are matters peculiarly within the province of the jury for its consideration upon the question of intent, and will be treated at full under the appropriate assignment of error. But in view of the emphasis laid by counsel for defendant upon this particular issue in the case, with which he prefaces his brief, we feel it would not be amiss at this time to assure the court that the evidence clearly tends to show the contrary, to-wit: that Henry Albers was not "heckled" in making these utterances, but that he made them voluntarily and deliberately; that while it is true that he had been drinking, that drink was merely the stimulant which gave to Albers the bravado and courage to vent his spleen against the United States; that drink was merely the means of saying in public what was lodging in his heart and

mind, demanding utterance; that drink was merely an additional reinforcement which urged and prompted him to say aloud what he had always wanted to say,—to preach the German doctrines and propaganda, he had always wanted to preach, and to say and to do things that probably he would not have said and done without "this reinforcement." As an illustration, we might cite the lurking, sneaking traitor to his country, who, if alone, would heed the dictates of prudence and endeavor to escape detection by his countrymen of his perfidious conduct, but who, if reinforced by a sufficient number of traitors or if the loyalists be proportionately decreased, would brazenly reveal himself in his true colors; he would ignore the promptings of discretion but heed those of the vinglorious braggadocio.

ASSIGNMENT OF ERRORS

There are thirty-three assignments, but so far as they are argued, they present but four simple questions for review, and therefore may readily be grouped under the following headings:

1. Sufficiency of the Indictment.
2. Motion for Directed Verdict.
3. Admissibility of Testimony.

4. Failure to give Requested Instructions.

SUFFICIENCY OF INDICTMENT

(A) It is urged though not very strenously, that the Espionage Act as amended is unconstitutional in that it violates and abridges the freedom of speech guaranteed by the Constitution of the United States. This point has, however already been settled adversely to defendant's contention by the Supreme Court in the recent cases of *Schenck vs. U. S.,* 248 U. S. (March 3, 1919); *Debbs vs. U. .S.,* 248 U. S. (March 10, 1919); *Frowerk vs. U. S.,* 248 U. S. (March 10, 1919).

(B) It is further urged that Counts 3 and 4 are duplicitous in this: that they each attempt to charge two crimes against the defendant. As respects Count 3, it is contended that it charges (1) the crime of uttering language intended to incite, provoke and encourage resistance to the United States, and (2) the crime of uttering language intended to promote the cause of its enemies. As respects Count 4, it is contended that it charges (1) the crime of wilfully supporting and favoring the cause of a country with which the United States was at war and (2)

the crime of wilfully opposing the cause of the United States in said war.

Count 3 is framed upon the following provision contained in the Espionage Act as amended May 16, 1918, which, so far as material, reads as follows:

> "Whoever, when the United States is at war * * * * * shall wilfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies * * * * *"

Count 4 is framed upon the following provisions contained in the same Act:

> "Whoever, when the United States is at war * * * * * shall by word or act support or favor the cause of a country with which the United States is at war, or by word or act oppose the cause of the United States therein * * * * *"

It must be plainly evident from an examination of these separate subdivisions of the statute, that the provisions thereof are so interrelated as to render it practically impossible to divide each of these subdivisions into two sep-

arate offenses. Furthermore, assuming the occasion might arise wherein certain language may encourage resistance to the United States during the war with Germany, and yet not promote the cause of Germany; after all, it is but one criminal act and has but one object in view, to-wit, the safeguarding of the American preparations necessary for the ultimate defeat of Germany. And so as to Count 4, even assuming that occasion might arise where certain words or acts may support the cause of Germany and yet not oppose the cause of the United States in this war, the object of this subdivision has a singleness of purpose that must be manifest, to-wit, that no word or act shall give aid or comfort to Germany, which might help to bring about the defeat of America.

However, irrespective of the exact determination of whether these subdivisions in the statute are divisible or not, we contend that as an elementary principle of pleading, these counts are not open to the attack of duplicity for where two separate offenses may be involved in the inclusion of one count, they may be properly embraced in one count where they are of a like class and nature as in this case.

The following citations found in Byrne on Federal Criminal Procedure, Section 152, furnish the necessary authority:

> "Duplicity consists of charging two distinct offenses against two separate statutes, punishable differently and requiring evidence of a different character.
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> * * * *
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> "Also when either of two acts is indictable and subject to the same measure of punishment, they may be charged in one count as one offense.
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> * * * *
>
> "Likewise, several different intents may be charged in connection with one act, without rendering the indictment duplicitous, especially if no prejudice results to defendant.
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> * * * *
>
> "If the indictment in charging one offense necessarily shows the commission of another by defendant, this does not constitute duplicity."

The following cases are submitted as supporting the doctrine that where a statute makes either

of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment, indictable as separate and distinct crimes, when committed by different persons, or at different times, they may, when committed by the same person, or at the same time be coupled in one count as constituting one offense.

U. S. vs. Heinze, 161 Fed. 425.
U. S. vs. Clark, 211 Fed. 916.
Crain vs. U. S., 162 U. S. 625.
Connors vs. U. S., 158 U. S. 408.

In the last analysis, attention need only be called to Section 1025 of the United States Revised Statutes to dispose of this assignment of error. Under this statute, no indictment shall be deemed insufficient, nor shall the trial be affected by reason of any defect or any imperfection in matter of form only, which shall not tend to the prejudice of the defendant. It certainly will not be argued that the defendant was, or could have been prejudiced in any manner whatsoever by the presentation of the charge in the manner that it was presented in the indictment.

Attention might also be called to the fact that

in the case of the *United States vs. Louisville & N Railway Company,* 165 Fed. 936, the Court held that the fault of duplicity should be reached by motion to elect, rather than by demurrer and cites the Supreme Court cases of *Crane vs. U. S.* supra, and *Connors vs. U. S.* supra, as authority for its views.

In the case of the *U. S. vs. Dembowski,* 252 Fed. 894, an Espionage case, District Judge Tuttle held:

> "Where a statute creates a single offense, but specifies in the alternative different acts, any one of which will constiute the offense, the indictment may charge the commission of such offense by all of the means mentioned, using the conjunctive 'and' wherever the statute uses the word 'or' without being duplicitous."

In the case of *Balbas vs. U. S.,* 257 Fed. 17, it was likewise contended that a certain count in the indictment was duplicitous. The Court held:

> "Only one offense is alleged, which may be committed in two modes and both of these modes may be joined in one count."

The following Espionage cases are further submitted, where similar counts to those now under attack, were approved by the courts and further indicate the unanimity of the method pursued in various districts in charging these particular offenses denounced by the statute:

U. S. vs. Buessel, (Bulletin 131) District Judge Howe.

U. S. vs. Zadamack (Bulletin 134) District Judge Westenhaver.

U. S. vs. Martin (Bulletin 157) District Judge Sanford.

U. S. vs. Equi (Bulletin 172) District Judge Bean.

From the instructions given by these judges as set out in these bulletins, it would appear that the facts charged in each of Counts 3 and 4 are considered as constituting but one offense under the statute.

(C) It is further urged that in any event these counts do not state facts sufficient to constitute a crime against the laws of the United States or to charge a crime against this defendant.

The statute with which the defendant is

charged to have violated, was enacted obviously to meet the war danger to the Government, danger arising within the body of the people rather than danger from the enemy on the battle line, and the importance of this legislation lies in the fact that it embodies the policy which the Government has adopted for its protection, particularly against internal interference with its military operations and war program.

The purpose of the Act is a practical one,—when the Government is at war, it is entitled to the support of every citizen; it is not only entitled to be free from interference of its citizens in the conduct of the war or the preparations for the war, but it is entitled to the support of every citizen, and that is true whether the citizen is with the country or against the country, or whether he deems his country right or wrong in the matter of the war. After war is declared, it becomes his duty not only to abstain from any interference with the preparations of the country looking to war, but to support the war himself.

As so well expressed by District Judge Bledsoe, in the case of the *U. S. vs. Motion Picture Film "Spirit of* '76", reported in Bulletin 33:

"This is no time or place for the exploita-

tion of that which, at another time or place or under different circumstances might be harmless and innocuous in its every aspect. It is like the 'right of free speech' upon which such stress is now being laid. That which in ordinary times might be clearly permissible or even commendable, in this hour of national emergency, effort and peril, may be as clearly treasonable and therefore properly subject to review and repression. The constitutional guaranty of free speech carries with it no right to subvert the purposes and destiny of the nation."

While urging that the indictment is insufficient, the defendant does not in any manner particularize the point wherein it is claimed the indictment is defective. It is, however, sufficient to state that the counts in this indictment are similar to those found in numerous Espionage cases, which have gone to conviction and which have withstood similar objections thereto. Each count follows the words of the statute and includes a statement of the facts and circumstances as sufficiently identify the acts charged as an offense against the Government.

As stated by Circuit Judge Morrow in the case

of *Rhuberg vs. U. S.*, 255 Fed. 865: "This is all that is required."

In the Espionage Case of *U. S. vs. Prieth,* 251 Fed. 946, the court said:

> "All that was required was that the indictment should acquaint the defendants with the nature and cause of the accusation; set forth the charge with sufficient definiteness to enable them to make their defense and to avail themselves of the record of the conviction or acquittal for their protection against further prosecution and to inform the court of the facts charged so that it may decide as to their sufficiency in law to support a conviction, if one should be had, and that the elements of the offense should be set forth with reasonable particularity of time, place and circumstances."

Applying these tests to this indictment, that as to the formal requisites, it surely is sufficient.

We also submit the following Espionage cases which have gone to the Circuit Court of Appeals, wherein indictments, similar to that in this case, were found sufficient:

Krafft vs. U. S., 249 Fed. 919.

O'Hare vs. U. S., 255 Fed, 538.
Doe vs. U. S., 253 Fed. 903.
Kirchner vs. U. S., 255 Fed. 301.
Rhuberg vs. U. S., 255 Fed. 865.
Shaffer vs. U. S., 255 Fed. 886.
Coldwell vs. U. S., 256 Fed. 805.
Heynacher vs. U. S., 257 Fed. 61.
Herman vs. U. S., 257 Fed. 601.
Wells vs. U. S., 257 Fed. 605.
Shidler vs. U. S., 257 Fed. 620.
Schumann vs. U. S., 258 Fed. 233.
Goldstein (9 C. C. A. decided 6-26-19).

The defendant in his brief, discussing this assignment, not only criticises the form of the indictment, but the argument is apparently extended to a challenge of the criminal character of the acts charged in the indictment.

In the case of *Krafft vs. U. S.*, 249 Fed. 919, affirmed in 247 U. S. 520, the Circuit Court of Appeals for the Third Circuit approved the holding of the lower court that there were but two questions involved in espionage cases, both of which were jury questions: the first question being whether or not the defendant spoke the words which are alleged in the indictment and with which he is charged with speaking, and the sec-

ond being whether, if he did, what was the intention in his mind in speaking them.

Again in the case of *Doe vs. U. S.*, 253 Fed. 903, the Circuit Court of Appeals for the Eighth Circuit held that the offenses charged in these espionage cases are clearly statutory, and that if the indictment charges the offense in the language of the statute together with such facts as to clearly apprise the defendant of what he must be prepared to meet and to what extent he may plead a formal acquittal or conviction, that it would be sufficient.

In the case of *O'Hare vs. U. S.*, 253 Fed. 538, the Court in sustaining the sufficiency of an indictment charging the offense of obstructing the recruiting and enlistment service of the United States, stated as follows:

> "By counsel ignoring the first part of the count, which coupled with those following is equivalent to the charge that the defendant did not merely attempt to obstruct, but actually did so and wilfully, the final averment of intent may be taken as an additional elaboration of the element of wilfulness."

In the case of *Schaffer vs. U. S.*, 255 Fed. 886, Circuit Judge Gilbert held:

"The plaintiff in error contends that the publication complained of contains no false statement, but only the opinion of the author of the book that patriotism is identical with murder and the spirit of the devil, that war is a crime and the argument that it was yet to be proved whether Germany had any intention or desire of attacking the United States. It is true that disapproval of war and the advocacy of peace are not crimes under the Espionage Act; but the question here is not whether the publication contained expressions only of opinion, and not statements of fact, but it is whether the natural and probable tendency and effect of the words quoted therefrom are such as are calculated to produce the result condemned by the statute. * * * * *

We think it should not be said as a matter of law that the reasonable and natural effect of the language quoted from the publication was not to obstruct—that is, not to impede, retard, or render more difficult—the recruiting or enlistment service and thus to injure

the service of the U. S. Printed matter may tend to obstruct the recruiting and enlistment service, even if it contains no mention of recruiting or enlistment, and no reference to the military service of the U. S. It is sufficient if the words used and disseminated are adapted to produce the result condemned by statute.

The service may be obstructed by attacking the justice of the cause for which the war is waged and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country. The great inspiration for entering into such service is patriotism, the love of country. To teach that patriotism is murder and the spirit of the devil, etc., is to weaken patriotism and the purpose to enlist or to render military service in the war."

In the case of *Kirchner vs. U. S.*, 255 Fed. 301, the Court held:

"The first contention on the demurrer is based on the supposition that the indictment charges the defendant merely with the utterance of opinions. The indictment alleges

that the defendant had said in substance that the U. S. Government in the prosecution of the war was corrupt and controlled by the moneyed interests. Certainly such an assertion could be made and intended as a statement of fact. * * * * The indictment contains at least one clear statement of fact alleged to be false; the remaining statements alleged to have been made may properly be treated as surplusage."

In the case of *Coldwell vs. U.S.*, 256 Fed. 808, the Court held:

"The Court submitted to the jury the determination of whether the words were spoken substantially as alleged, and, if so, whether they were adapted to create the offenses charged, and also the intent with which they were uttered; and we must accept the verdict of the jury in favor of the government on these issues as fully sustained by the evidence, provided the allegations in the indictment were sufficient in law to sustain it.

* * * *

"The time and place when and where the

alleged statements were made by the defendant, and all the surrounding circumstances, could be considered by the jury, and were properly for their consideration, in arriving at a conclusion in regard to whether their utterance constituted the attempt charged as well as the intent of the defendant in making them. The language attributed to the defendant does not call for any legal or expert knowledge in its interpretation, and the jury was as well able to judge of its adaptability to produce the results alleged as the court.

* * * *

"Whether the statements alleged to have been made constituted, under the circumstances, an attempt 'to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States', or an obstruction of 'the recruiting or enlistment service of the United States to the injury of the service or of the United States', were questions for the jury."

In the case of *Haynacker vs. U. S.*, 257 Fed. 61, the court affirmed the judgment of conviction for causing and attempting to cause disloyalty in the military forces of the United

States and for obstructing the recruiting and enlistment service of the United States, based upon the following utterances made to a young man eligible to enlistment, which the Court held sufficient under the statute:

> "That he should not enlist, that the present war was all foolishness and (a vulgar word which need not be repeated), and that my talk of enlisting was all nonsense; that the war was for the big bugs in Wall Street; that it was all foolishness to send our boys over there to get killed by the thousands, all for the sake of Wall Street; that he should not go to war until he had to."

In the case of *Shidler vs. U. S.*, 257 Fed. 629, Circuit Judge Hunt said:

> "With respect to the fourth count, it is argued that the statements alleged could be construed as the honest expression of an individual citizen or a reckless statement of opinion. Assuming for the purposes of argument, that a man might express such opinions and still be loyal to his country, still if wilfully and with evil mind he uttered the language with the intention of bringing about

insubordination, disloyalty and refusal of duty in the military forces of the land, he has violated the law and is subject to punishment and should be brought to trial. His acts, his speech, and the state of his mind become matters for the consideration by a jury under proper instructions upon the law of attempt to commit a crime."

In the case of *Goldstein vs. U. S.*, decided May 26, 1919, Circuit Judge Hunt said:

"Enacted as the statute was while the country was at war, the evident, underlying purpose of its language was to prevent any wilful attempt to engender feelings of lack of fidelity to the United States among the military or naval forces or any attempt made with evil mind to cause any disobedience to lawful authority in the military or naval forces; and the statute should always be read in the light of the purpose of its enactment.

* * * *

"We believe that the issues under the counts were properly for the jury."

Under the authorities above cited, we earnest-

ly contend that there are but two questions involved in this case: (1) Whether or not the defendant spoke the words which are alleged in the indictment, and (2) if he did, what was the intention in his mind in speaking them. We do not think it will be seriously urged that the defendant did not make the statements attributed to him in the indictment. In fact, it is practically conceded in defendant's brief and, therefore, there is but one question left for determination, and that is whether or not the defendant in saying these things, intended to violate the law in the manner charged. This, of course, is clearly a question of fact for the jury. Whether or not the evidence was of such a substantial character as to support the verdict of the jury is not a proper matter for consideration under this assignment, but will be treated fully under the succeeding assignment.

II.

MOTION FOR DIRECTED VERDICT.

This motion presents but one question, and that is whether or not there was any substantial evidence, at the trial, of the guilt of the defendant. It must be manifest from defendant's argu-

ment that counsel places undue emphasis, so far as this appeal is concerned, upon the weight of the testimony and not the sufficiency thereof.

No citations are necessary that courts of review will not undertake to set aside the verdict of the jury because they might possibly come to a different conclusion, nor will they seek to substitute their judgment in place of the jury's, but will simply consider the question whether there was *any* substantial evidence offered at the trial to support the verdict that the jury did find. As disclosed by the authorities hereinbefore cited, the question of intent is a vital factor in the case. Counsel claims that the defendant had no such wilful intent as attributed to him in the indictment, and asserts that the weight of the testimony indicated that at the time of making the utterances charged in the indictment, he was "heckled" in the making of them while in a drunken stupor. Clearly if this defense was presented to the jury under appropriate instruction, no error could be urged if the jury in its determination found the situation to be the contrary to that insisted upon by defendant. In other words, it is our contention that this court cannot under this assignment seek to ascertain whether the jury

should have found a verdict of guilty but is only concerned with the fact, whether there was *any* stantial evidence, at all, introduced at the trial that would support its verdict.

The defendant practically concedes that the defendant made the statements with which he stands accused, but urges that the jury was not warranted in attributing to him the wilful intent of (1) inciting, provoking and encouraging resistance to the United States, and promoting the cause of its enemies; nor, the wilful intent of (2) supporting and favoring the cause of Germany and opposing the cause of the United States therein. We set out the specific intents, for it is with them only that we are concerned, as the jury acquitted the defendant upon the other offenses involving other and different intents. The court should, therefore, not be confused by the defendant's argument as to the impossibility of the defendant intending to obstruct the recruiting or enlistment service of the United States or the impossibility of his causing or attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces of the United States.

But we do assert that so far as the intents in-

volved in Counts Three and Four of the indictment are concerned, and upon which the jury returned a verdict of "guilty," that there was sufficient evidence to support that verdict, irrespective of any argument whether or not the weight of the evidence was in accord with that verdict. Under our system of jurisprudence the province of the jury is supreme. It has the exclusive jurisdiction to determine questions of fact and to it alone is given the duty of measuring the weight and appraising the value of the testimony. So long, therefore, as the jury does not act arbitrarily and without justification, there can be no ground for error under this assignment. Of course, the verdict is not agreeable to the views entertained by the defendant, but that naturally is to be expected.

Bearing in mind, therefore, that the defendant practically concedes the making of these utterances, though urging the lack of sufficient proof upon the question of wilful intent, we, therefore, submit a resume of the testimony upon this specific issue, to-wit: intent. This issue clearly presents a question of fact for the determination of the jury alone (*Coldwell vs. U. S., supra.*) We have every assurance that the following resume

will disclose sufficient facts and circumstances from which the jury could reasonably and logically come to the conclusion that it did. In any event, the record shows *some* substantial evidence upon this specific issue, to-wit: intent, that is sufficient to support the verdict. That being so, no legal reason can be advanced by defendant why this verdict should be disturbed, so far as this assignment is concerned.

JUDSON A. MEADE (Trans. P. 67) age 45; a resident of Los Angeles, California, and engaged in the oil business, testified that on October 8th, 1918, he was on train No. 54, enroute to Portland and to the oil fields in Northern Canada. That prior to that time he had never met the defendant, Albers, Tichenor, Kinney, Bendixen, or Gaumaunt; that about 8 o'clock in the evening of October 8th, he saw Albers and Gaumaunt in the smoking compartment; that they were engaged in conversation during the course of which the witness heard Albers make the remarks set out in the record; that Albers made these remarks very emphatically and with gesticulations; that Albers' condition was that of a man who had been drinking but not to such an extent that it impaired the possession of his full mental facul-

ties; that there was nothing about his actions that did not indicate that Albers had full possession of all his faculties.

FRANK B. TICHENOR (81) resident of Portland, Oregon and deputy United States Marshal for Oregon, boarded train No. 54 at Grants Pass, enroute to Roseburg, where he had warrants to serve; that he had gone to Grants Pass to serve subpoenas issued out of Portland; that he testified that he did not know Albers was on that train, had never met him and knew him only by reputation; that he had never met any of the other witnesses prior to that time; that after he had his dinner on the train he went into the smoking room, where he saw Albers and Gaumaunt engaged in conversation. That noticing a pint bottle of liquor in the room, he suggested that it be put away. After leaving the smoking car, Gaumaunt intercepted him and wanted to know if he (Tichenor) was an officer, whereupon being advised that he was, Gaumaunt told him that there was a pro-German in that room and that because of his pro-German statements he was likely to be beaten up. That witness told him he could accomplish nothing by beating Albers up, but that the best way would be to find out what

Albers was saying and then to report it. That later the witness overheard the defendant make certain of the remarks testified to by the other witnesses. That Albers' condition at the time witness saw him was that of a man who had been drinking, but that he spoke very distinctly and was emphatic in his remarks.

L. W. KINNEY (89), aged 48 a resident of Portland, Oregon, and engaged in the merchandise brokerage business, testified that he was on train No. 54, leaving San Francisco, October 7th, enroute to Portland; that up to that time he had never met defendant Albers or any of the other witnesses, nor did he know they were going to be on the train; that shortly after the train left Medford, he went into the smoking room and saw Gaumaunt with Albers and entered into the conversation at which time Albers made a number of decidedly pro-German statements which are set out in the record; that in making some of the remarks Albers was very emphatic, pounding his left hand on his knee; that the witness most certainly thought Albers had possession of his faculties and seemed to know what he was saying and doing.

L. E. GAUMAUNT (100), age 30 years and

engaged in the automobile business at Kent, Washington, and also a special Deputy Sheriff for King County, Washington, testified that he was aboard train No. 54 on October 8th, enroute to Portland and Kent, Washington, his home; that he did not know and had not met the defendant Albers or any of the other witnesses. That prior to his conversation with the defendant, he had not discussed Albers with anyone; that he went into the smoking room about eight in the evening of October 8th, when he noticed the defendant talking with Mr. Kinney and in the course of that conversation and in subsequent conversations defendant made a number of the remarks set out in the indictment; that while the defendant had been drinking, his speech was plain and that he expressed himself vigorously, at times pounding his knee.

E. C. BENDIXEN (116), age 31, a resident of Portland and employed as Auditor and Inspector of the Aetna Life Insurance Company, Casualty Department, testified that on October 8, 1918, he was at Grants Pass on a matter of business; that he boarded train No. 54 at Grants Pass at 6:30 P. M.; at that time he was not acquainted with the defendant or any of the witnesses with

the exception of Mr. Tichenor, whom he knew by sight, though he had never met him. That he observed the defendant in the smoking compartment, but did not talk with him until after Mr. Tichenor asked him to find out if the defendant was Mr. Henry Albers. That after some hesitation, he agreed to make inquiry; that thereupon he went into the smoking room and introduced himself as Erwin Bendixen and said that probably the defendant knew his Uncle Peter Bendixen; that the conversation was carried on in German; that the defendant told him he knew his uncle and that thereupon witness warned the defendant against making seditious remarks and urged him not to do so; that in spite of the warning, the defendant persisted in making the remarks set out in the indictment; that the defendant was emphatic in his talk; understood the questions put to him by the witness and answered clearly and distinctly.

D. Y. ALLISON (251), testified that he is in the employ of the Southern Pacific Railroad Company as brakeman; that he was working in that capacity on train No. 54 on October 8th, 1918; that he knows the defendant by sight; that he paid no particular attention to defendant,

except on one occasion while walking back to the rear of the train he saw the defendant and several gentlemen in conversation in the smoking room; that everything seemed to be all right; that on another occasion when the train was leaving Medford, he passed by the smoking room and heard loud talking; that he looked in and saw the defendant; that while he considered Albers had been drinking, he did not consider him intoxicated.

During the course of the Government's case the defendant's counsel made the following statement:

> "We have never doubted that this man was strongly pro-German before we entered the war. There will be no dispute about that here." (137).

The above testimony relates directly to the exact charge contained in the indictment. The following witnesses were called to prove the bent of mind of the defendant, from which the jury might ascertain the *intent* of the defendant in making the statements charged—that is, the intents as charged in Counts 3 and 4 of the indictment.

OLGA GOMES (130), testified that she resided at San Francisco, California; that she was employed as a manicurist at the Sutter Hotel Barber Shop, where she met the defendant Henry Albers; that he was introduced to her in April of 1918 by a Mr. Jack O'Neill, a friend of the defendant. She had previously advised Mr. O'Neill that she had lived at Milwaukie, Oregon, where the defendant has his home. On the occasion of their first meeting, while manicuring Mr. Albers, they discussed their mutual friends at Milwaukie, Oregon, and that he suddenly changed his conversation when some one in the Barber Shop discussed the war. Upon this occasion he told her very distinctly:

> That he was a Kaiser man from head to foot.

The witness dissuaded him from further discussion upon that subject and that immediately after manicuring him, she having previously been invited by Mr. O'Neill to accompany him, a Miss Wade and the defendant, on an auto trip, started on this trip. She sat alongside of the defendant in the taxicab while Mr. O'Neill was with Miss Wade on the two little seats in front. They rode toward Stanford University at Palo

Alto. That during the ride she remembered distinctly the following remarks made by the defendant:

> "I am a millionaire and I will spend every cent I have to help Germany win the war."

That he thereupon pounded on his knee and made this remark:

> "Deutschland uber alles."

That he was warned by Miss Wade to shut up; that they might be interned. Thereupon the defendant said:

> "I am a spy and I am ready to be shot right now for Germany."

> "There will be a revolution in the United States."

The witness states that she remembers these remarks so well because of the impression they made upon her; that they worried her so much that she finally caused the matter to be reported to the United States Attorney at San Francisco.

HENRY CERRANO (136), a resident of Portland, Oregon, a naturalized citizen of Italian descent, tesified that in October, 1915, he was

employed as janitor, cleaning windows, for Albers Brothers, with which firm the defendant, Henry Albers, was connected; that the witness remembers the defendant coming into the office with a German American paper and giving the same to a young man who was working at a typewriting machine, and saying:

> "Look at that paper. See what the German Army is doing. The German Army is doing wonderful, and France and England come very easy;"

that when the defendant left the room, the witness heard him make this statement:

> "One Kaiser, and one God."

N. F. TITUS (139), a resident of Portland, Oregon, testified that while employed with the Columbia Navigation Company, having his headquarters and business office on Albers Dock No. 3, adjoining the mill of Albers Brothers, at Portland, he had occasion to see a good deal of the defendant during the year 1917 and up to about March 1, 1918; that he had a great many conversations with him concerning the war, during the course of which the defendant stated:

That all that appeared in the papers about the atrocities in Belgium were lies; that the press of America was dominated by the English press, and that to get the truth one would have to read the German newspapers.

The defendant further stated in the course of his conversations with the witness, respecting the exchange of notes between the United States and Germany:

That the United States was mislead in their position due to the influence of the British press.

The defendant further stated in comparing our Army with that of the German Army:

That our soldiers were amateurs going up against professionals, and he doubted under the circumstances if we could beat the Germany Army in a thousand years.

That these statements were made in the course of conversations had between witness and the defendant subsequent to our entrance in the war.

G. M. WARDELL (150), testified that about the middle of February, 1918, he saw the defen-

dant at Wheeler, Tillamook County, Oregon; that he heard the defendant make the remark:

> That when the Germans got well organized, that with their submarines there would be no chance for any boats to go across, and that he hoped they would blow every British ship out of the water.

DAVID McKINNON (153), Superintendent of Construction of the Standifer Steel Company, at Vancouver, Washington, testified that he was acquainted with the defendant, and that he met him in San Francisco after the World War, some time in September or October or November of 1914; that the defendant, himself, brought up the subject of the war, asking him:

> "What do you think of our British cousins?"

When witness told the defendant that they were no cousins of his, the defendant made the following statement:

> "Never mind, before we get through with them *we* will kill every man, woman and child in England."

Witness is sure that the defendant used the word "we."

In rebuttal, after the proper impeaching questions had been asked the defendant, the following testimony was elicited:

FRED HAINES (253), who conducts a store at Harney, Oregon, testified that on or about the middle of September, 1916, he was at Hot Lake, Oregon, where he had a conversation with the defendant, at which time the defendant told him that he had been to Baltimore when the German submarine "Deutchland" came in and that he met the captain, Captain Koening, and some of the crew.

HORACE A. CUSHING (254), Manager of the Lily Seed Company of Portland, testified that shortly after Germany declared war against France and Great Britain, the defendant offered to bet witness $1,000 to 50 cents that the Kaiser could lick the world.

JOHN H. NOYES (254), the Manager of the Grain Department of the Globe Grain & Milling Company, Portland, Oregon, testified that in November, 1914, the defendant made a bet of $10.00 with the witness, that the German Army would be in London in sixty days; that in December, 1915, the defendant bet $10.00 with the witness

that the war would be over April 1, 1916. Mr. Albers lost, of course. One of the bets was paid.

It must already appear quite evident from a perusal of the above, that there was some substantial evidence introduced at the trial tending to prove the criminal intent found by the jury by its verdict of guilty. As heretofore stated, the utterance of the words by the defendant was admitted. It was urged in defense, however, that the defendant was "heckled" in making these utterances, while in a drunken stupor. That was clearly a question of fact for the determination of the jury. There was some substantial evidence tending to prove that while the defendant had been drinking, he was in full possession of all his mental capacities and was perfectly conscious of what he was saying and doing, as evidenced by the emphasis which he placed upon certain statements; by the bitterness of his feelings against this country; by the quick and responsive answers to the questions put to him; by his wilful disregard of the warnings given to him; all this tending to disprove the defendant's defense of unconscious offending and tending to prove that the statements were deliberately and intentionally made, al-

though prompted undoubtedly by a spirit of boastfulness and braggadocio so characteristic of the former Imperial German subjects.

We, therefore, contend that taking into consideration the evidence of Miss Gomes, Mr. McKinnon, Mr. Wardell, Mr. Cerrano and others, who testified as to similar statements on other occasions, that the evidence is sufficient to support the conclusion reached by the jury that the defendant said these things with the intent to support and favor the cause of Germany and oppose the cause of the United States and with the intent to incite, provoke and encourage resistance to the United States and promote the cause of its enemies.

It is the plea of counsel that the Court should have directed a verdict in favor of the defendant. We feel that under the circumstances as disclosed by the record, the Court had no other alternative but to present the case, under proper instructions, to the jury for its determination upon the question of intent. It seems presumptuous on the part of counsel to urge that in the face of this record, the court was compelled to take this case away from the jury, particularly when the testimony upon the issue of intent was

so conflicting. It, therefore, became the clear duty of the Court to present the matter to the jury.

It is well established that where any question of fact exists, or even where different inferences may be drawn from circumstances shown without contradiction, the case is clearly one for the exclusive determination by the jury. (*Hudson & M. R. Co., v. Iorio,* 239 Fed. 855). The rule is well stated in the case of *McLaughlin v. Joseph Horne Co.,* 206 Fed. 246 to be:

> "It is sometimes the duty of the judge to direct a verdict for one party or the other, but he has no power to do so where the testimony is oral and conflicting, or where, although the facts are not directly disputed, it is uncertain what inferences should be drawn from them. Inferences of fact are themselves facts and ordinarily the jury must draw them and not the judge."

Where there is any dispute as to material facts, it has been held time and time again that the appellate court will not weigh the conflicting evidence or determine what it thinks to be the weight of the evidence appearing in the record.

In the recent case of *Frain v. U. S.*, 255 Fed. 30, where a judgment for conviction on the charge of conspiring to resist the draft was affirmed, the Circuit Court, in disposing of a similar species of assignment as is here urged rendered the following opinion thereon, which is so clearly in point that we maintain it is conclusive so far as this assignment is concerned:

> "Plaintiffs in error are really objecting to the weight of the evidence and appealing to this court to override the jury's verdict. * * * We are not permitted to be concerned with that matter. Appellate courts, unless given power by statute, do not sit to correct the possible errors of the jury, but those of the court. While it is the jury's duty to take the law from the court, and to apply that law to the facts as they find them, and it is the court's duty to see that there is some evidence tending to prove every element of the crime alleged, the jury's supremacy as to facts, including the inferences of fact drawn from proven phenomena, is unquestioned."

III.

RE ADMISSIBILITY OF EVIDENCE

(A) It is contended that the court erred in allowing the Government to introduce in evidence, for the purpose of showing intent, statements made by the defendant at other times than upon the occasion specified in the indictment. The defendant's counsel in his brief states:

> "The statments of these witnesses admitted in evidence tended to produce in the minds of the jury the idea that plaintiff in error harbored a brutal, bloodthirsty hatred of England and France, without having any tendency, whatever, to establish in the least degree his attitude as between Germany and the United States in the war between them. * * *"

This objection is particularly directed against the testimony of McKinnon and Cerrano relative to statements made by defendant prior to our entrance into the war.

A similar objection, based upon a similar line of reasoning as advanced in defendant's brief, was made in the case of *Rhuberg v. U. S.* (255 Fed. 865), arising in this District, where the defendant Julius Rhuberg, in many respects a counter-part of Henry Albers, was convicted for

violation of the Espionage Act, and his conviction affirmed. There too, Julius Rhuberg, like Henry Albers, German born, enriched by the bounty of this country, made statements in 1914 and 1915, evincing a bitter hatred against England. There too, these statements were admitted in evidence by the court. Answering this objection, Circuit Judge Morrow said:

> "The evidence of statements of the defendant made prior to the entry of the United States into the war, thus restricted and limited by the court, was clearly admissible under a well known rule of evidence upon that subject."

It is further urged that the testimony of Cerrano and McKinnon merely tended to show a bitter hatred against England without in any way tending to show any disloyalty to America as between Germany and America. It cannot, however, be disputed but that this hatred toward England was expressed after war was in progress between England and Germany and, therefore, such testimony tended to show full sympathy with Germany. This line of testimony is identical with that offered in evidence in the

Rhuberg case and, therefore, these cases are in every respect parallel so far as this assignment is concerned. As in the Rhuberg case, this testimony was offered for the purpose of ascertaining the bent of the mind of the defendant, or his attitude toward this Government, or toward Germany. This case is no exception to the general rule as announced and promulgated in the Rhuberg case, for where it appears that an individual charged with an offense under this statute was in full sympathy with Germany prior to the time when this country entered into the war with Germany, that fact itself would be a matter to be taken into consideration in order to determine his attitude of mind at the present time. There clearly was no error in the admission of this evidence.

Following the case of *Rhuberg v. U. S.* supra, this court had occasion to pass upon similar assignments in the case of *Shilder v. U. S.* (257 Fed. 620) and *Herman v. U. S.* (257 Fed. 601).

In the case of *Shilder v. U. S.* supra, Circuit Judge Hunt, in disposing of this assignment, stated as follows:

> "Certain statements made by the defendant prior to the declaration of war were

admitted over the objection of defendant's counsel. The Court, however, in admitting such statements, expressly ruled that they were before the jury solely to enable it to determine what the defendant's state of mind was at the time he uttered the statements charged in the indictment. We find no error in the ruling."

At the time the testimony of McKinnon and Cerrano was offered by the Government, the Court expressly limited and qualified the effect and so likewise instructed the jury. (Trans. P. 308).

It will thus be seen by reading these instructions that the Court carefully instructed the jury to what extent it might regard this testimony; that this testimony might be considered by the jury for only one purpose, to-wit: to determine the intent actuating the mind of the defendant in doing the things charged against him, if the jury should first be satisfied beyond a reasonable doubt that he had wilfully utttered the things charged in the indictment.

That the trial court was correct in its ruling is supported by an overwhelming weight of

authorities which are unnecessary to cite, in view of the attitude of this court upon the competency of this testimony as disclosed by the recent cases of *Rhuberg v. U. S.*, supra; *Shilder v. U. S.*, supra; and *Herman v. U. S.*, supra.

(B) It is further contended that the court erred in admitting in evidence the testimony of the witness E. C. Bendixen, upon the ground that the statements alleged to have been made by the defendant to Bendixen being in German, that such testimony constituted a variance from the charge in the indictment. In support of his contention, defendant cites a number of cases, all, however, involving either the charge of slander or libel. In brief, the defendant contends that the pleading should have set out the statement made to Bendixen in the German language, together with translation of their meaning into the English language and the pleading having failed to do so, it was insufficient to authorize the admission of Bendixen's evidence.

It ought to be a sufficient answer to say that the Espionage Act does not purport to set out an offense of libel or slander and, therefore, indictments charging violations of the Espionage Act are not required to come up to the standard

prescribed for indictments or complaints charging libel or slander.

Libel and slander are based upon the publication and utterance of the *particular words which in themselves* constitute the offense. The offenses denounced by the Espionage Act, are not confined to *writings* or *words,* as in libel and slander, but may be committed by other means, as for instance: the act ofobstructing the recruiting; the act of inciting insubordination; the act of supporting the cause of Germany, etc. The recital of the *words* in an Espionage indictment are merely for the purpose of identifying and particularizing the charge that the defendant is required to meet, and in no sense are the words themselves the specific offenses condemned by the statute as they are in the cases of libel or slander. The distinction between libel and slander on the one hand, and the offences denounced by the Espionage Act, seems to us so plain that we feel justified in concluding the discussion with the opinion of the trial Judge upon this question when it was submitted to him upon the motion to set aside the verdict. This is so clearly convincing and conclusive that further discussion would be unwarranted:

"The court passed upon that question at the time it was raised during the trial, and it based its decision entirely upon the statute itself, which declared that whosoever shall by word or act, transgress this law shall be guilty of an offense. Construing the language 'word or act,' 'word,' of course, includes speech. If that speech be delivered in any language, it is a violation of the law if it contravenes this statute. I need not dwell upon that. It is, however, urged that the language should have been set forth in the indictment in the German, and then the indictment should have explained that (translating into English) it means so and so.

"A defendant is entitled at all times to have the offense charged in such terms, and by such particularity, that he may be able to concert his defense and put the whole evidence before the court and the jury.

"Now, this indictment states in specific terms what the defendant said, and undoubtedly, to my mind, it gave him full and particular notice of the charge made against him, and there was nothing left that would operate to deter him in any way from pre-

paring himself for the defense in this case. When all is considered, I do not think that he was misled in any way by the indictment, but that he was fully warned as to what he would be required to meet when it came to the trial. The proof did show that part of this language was spoken in German, and part of it was spoken in English. I do not believe that, because it was spoken in German, that was a variation or a departure that would require this court to set aside the verdict in this case."

Moreover, it is elementary that a variance of this kind cannot prejudice the defendant if the allegations in the indictment and the proof so correspond that the defendant is informed of the charge and can protect himself from a second prosecution for the same offense. It will not be argued that the defendant was, or could possibly have been, misled by the nature of the proof.

Bennett v. U. S., 227 U. S. 333.

Bennett v. U. S., 194 Fed. 630.

Jones v. U. S., 179 Fed. 584.

As stated by District Judge Brown, in his

general charge to the court in the case of *U. S. v Coldwell* (Bulletin 158), which went to conviction and was affirmed in 256 Fed. 805:

> "Mere slight variations of expression, as I have said, would not constitute a fatal variance. No variance would be regarded as material which did not prejudice the defendant in apprising him of the offense, or change the character of the charge against him."

(C) It is further urged that the court erred in admitting in evidence the testimony of Eva T. Bendixen, offered by the Government in rebuttal (Assignment 12, Trans. P. 51). It is contended that this evidence was not proper rebuttal and was not competent for the purpose of impeachment.

Attention is called to the testimony of defendant's witness WESLEY NIPPOLT (Trans. P. 158), who testified he visited the home of Mr. and Mrs. E. C. Bendixen on October 10, 1918, at which time he claims Mr. Bendixen had made the statement that he had fixed his Uncle's stock plenty, and that he considered the entrapping of Henry Albers as his bit in the war. Upon cross-

examination Mr. Nippolt stated that he "guessed" Mrs. Bendixen was present when her husband made this alleged statement.

Certainly the Government was entitled to rebut the testimony of the defendant's witness Nippolt as to what transpired when Mr. Nippolt made this "opportune visit." There was nothing in her evidence to warrant calling Mrs. Bendixen in support of the Government's direct case, as contended by the defendant. It had no reference to the case in chief, and its only relevancy was due to the fact that the defendant, himself, volunteered the testimony of Mr. Nippolt by way of impeaching the Government's witness E. C. Bendixen, who had previously denied making any such statement as Mr. Nippolt claimed. When, however, Mr. Nippolt stated that Mrs. Bendixen was present when this alleged statement was made, not to have called her in rebuttal would have been tantamount to an adimission that such statements had in fact been heard by her. We cannot understand how counsel can maintain with any sincerity, that we were barred from this testimony.

It is further urged that the Government was

precluded from questioning Mrs. Bendixen further, after she had denied in toto what Mr. Nippolt claimed had been said in her presence. Upon examining the record (Trans. P. 248) the court will readily see that the testimony now objected to was merely offered by way of explanation as to what conversation was actually had between Mr. Nippolt and Mr. Bendixen concerning the very subject matter about which Mr. Nippolt was asked, and how such conversation came about. This certainly cannot be claimed as an attempt to bolster up the testimony of Mr. Bendixen when it had absolutely no reference to the Government's case in chief, and had no direct connection, whatsoever, with the testimony of the Government's witness as to what took place on train No. 54. This testimony was brought about through the act of the defendant, himself, in presenting as one of his star witnesses a man who claimed to have elicited certain alleged damaging "confessions" from Mr. E. C. Bendixen, in the presence of his wife, when in truth and in fact no such alleged "confessions" had been made. The court properly allowed Mrs. Bendixen to explain the presence of Mr. Nippolt and how the conversation that did take place

came about. In any event, this testimony, as counsel admits, was of no great importance and could in no wise have prejudiced the case of the defendant so far as the issues involved were concerned. The lower court is vested with sufficient discretion to control and limit the scope of the examination.

Chicago, M. & St. P. Railroad Co. v. Chamberlin, 253 Fed. 429).

(D) It is further contended that the court erred in admitttng in evidence the testimony of HORACE A. CUSHING (Trans. P. 254) and JOHN NOYES (Trans. P. 254), relative to certain bets which had been made between them and the defendant, Henry Albers, as to the outcome of the war. Though not seriously urged, the defendant maintains that this was an attempt to impeach the defendant upon immaterial matter.

The record will show that while Henry Albers was on the stand in his defense, he offered evidence tending to prove his loyalty to this country even prior to our entrance into the war, and related at some length the things he had done for the Government, while at the same time

protesting his aversion to German militarism and his sympathy for the allied cause at the time Germany invaded Belgium. (Trans. P. 231).

Upon cross-examination his attention was particularly called to the bets made with Mr. Cushing and with Mr. Noyes, and the usual and proper impeaching questions were propounded to him. He positively stated that he had made no bets about the outcome of the war. (Trans. P. 245).

It was, therefore, proper for the Government, for the purpose of impeaching and attacking the credibility of the defendant, Henry Albers, as a witness upon a matter vitally material to the issue in the case, to-wit: the loyalty of Henry Albers, to call Mr. Cushing and Mr. Noyes in rebuttal and to disprove the testimony given by Mr Albers, concerning which his attention had been specifically called.

In the case of *Heynacher v. U. S.* (257 Fed. 261), an Espionage case, the Government introduced a letter written by the defendant to the President of the German American Alliance of his state, enclosing a newspaper clipping telling

of the escape of a German soldier who told of the brutality of the German officers, conditions behind the German lines, etc., with the defendant's comment "What kind of swine is this?" The Circuit Court held that this letter was properly admissible to rebut the effect of defendant's evidence that he was a member of the Red Cross and gave free posting to army and navy advertisements on his bill boards, etc.; that it tended to show that the public manifestations of loyalty on which the accused relied should not receive the full consideration he claimed for them.

The similarity of these cases is so striking, that we esteem further discussion upon this point unnecessary.

IV.
FAILURE TO GIVE REQUESTED INSTRUCTIONS

(A) It is contended by the defendant that the court erred in failing to give the following requested instructions:

> "If the defendant was intoxicated at the time of making any of the statements set forth in Counts 1, 2, 3 and 4 of the indictment, to such an extent that he could not

deliberate upon or understand what he said, or have an intention to say what he did, you should find the defendant not guilty upon each of said Counts 1, 2, 3 and 4 of the indictment.

"While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if upon the whole evidence in this case, by reason of defendant's intoxication (if you find he was intoxicated at the time), you have such reasonable doubt whether at the time of the utterance of the alleged language (if you find from the evidence defendant did utter said language) that defendant did not have sufficient mental capacity to appreciate and understand the meaning of said language and the use to which it was made; that there was an absence of purpose, motives or intent on his part to violate the Espionage Act at said time, then you cannot find him guilty upon Counts 1, 2, 3 and 4, although such inability and lack of intent was the result of intoxication."

(Assignment 20. Trans. P. 54).

"If the jury finds that the defendant

made the statements alleged in Counts 1, 2, 3 and 4 of the indictment, and that said statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts 1, 2, 3 and 4."

(Assignment 21. Trans. P. 55).

The court had previously instructed the jury upon the issue of drunkenness, thus raised by the defendant, as follows:

"Intent is an essential element in the perpetration of each of the four offenses charged against the defendant in these first four counts of the indictment. If the intent is absent, the defendant cannot be held accountable for what he is alleged to have done. Drunkenness is no excuse for the commission of a criminal offense, yet while this is the law, it is also the law that, where a specific intent is necessary to be proved before a conviction can he had, it is competent to show that the accused was at the time wholly incapable of forming such intent, whether from intoxication or otherwise. In other words, it is a proper defense to show that the

accused was intoxicated to such a degree as rendered him incapable of entertaining the specific intent essential to the commission of the crime charged.

"I therefore instruct you, gentlemen of the jury, that, if the defendant was intoxicated at the time of making any of these statements which are set forth in Counts 1, 2, 3 and 4, to such an extent that he could not deliberate upon or understand what he said, or form an intention to say what he did, your verdict should be not guilty. Otherwise, such a conclusion would not necessarily follow.

"This, as I have indicated, pertains to the first four counts in the indictment.

"It is common knowledge, however, that a person who is much intoxicated may nevertheless be capable of understanding and intending to utter the things that he is pleased to speak. And, as I have advised you, evidence of drunkenness is admissible solely with reference to the question of intent. The weight to be given it is a matter for the jury to determine, and it should be received with

of intoxication from the defendant to the Government, we do not believe it to be the law. It is not the law in the State of Oregon, as admitted by the defendant in his brief, and no Federal cases are cited in support of any such doctrine as advanced by the defendant.

It is elementary that intoxication is no excuse for the commission of a criminal offense, but where a specific intent is an essential ingredient of the crime it is proper for the accused to show that he was too intoxicated to be capable of forming such an intent. It does not therefore follow, that, because the jury must find the necessary intent beyond a reasonable doubt, that the Government must also satisfy the jury beyond a reasonable doubt that the defendant was not sufficiently intoxicated to be incapable of forming that intent. This was clearly a matter of defense, to which appropriate attention was called by the court. The court therefore properly refused to give the instruction in the language requested by the defendant, and more than sufficiently safeguarded his rights in the general charge as indicated above.

(*O'Hare v. U. S.*, supra.)

In the case of *United States v. Buessel* (Bul-

letin 131), wherein the defendant was charged, as in this case, with the offense of supporting and favoring the cause of Germany and opposing the cause of the United States, in violation of the Espionage Act, Judge Howe gave the following instruction touching upon the question of intoxication:

> "If the defendnt was intoxicated at the time of making any of the statements to such an extent that he could not deliberate upon or understand what he said or form an intention to say what he did, your verdict should be not guilty as to any statements which he made when in that condition of intoxication. You should bear in mind, however, that a person who is much intoxicated may nevertheless be capable of understanding and intending what he says."

Moreover, there is a familiar legal presumption in every criminal case, with which counsel must undoubtedly be familiar, that a man intends that which he does. This presumption is frequently availed of in Espionage cases, and was fully approved in the case of *Kirchner v. U. S.* (255 Fed. 301). With this presumption

accorded to the Government at the outset in a trial of an Espionage case, it would be highly inconsistent, to say the least, that the Government would, nevertheless, be required to convince the jury beyond a reasonable doubt of the defendant's sobriety.

We therefore submit that the trial court's instruction was in accord with the law of the case, and it was not in error to refuse to give the instruction in the language requested.

(B) It is further urged that the court erred in failing to give the following requested instructions:

> "The mere utterance or use of the words and statements set forth in the several counts of the indictment does not constitute an offense in any of said counts. Before a defendant is guilty of violating the statute by oral statements such statements must be made wilfully and with the specific intent made necessary by the statute, and such words and oral statements must be such that their necessary and legitimate consequence will produce the results forbidden by the statute."

(Assignment 17. Trans. P. 53).

"While it is a rule of law that every person is presumed to intend the necessary and legitimate consequences of what he knowingly does or says, the jury, however, has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence thereof. A jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inference than to find any other fact without evidence."

(Assignment 18. Trans. P. 53).

In its general charge, the court had previously instructed the jury as follows:

"The criminal intent essential to any violation of the statute means a wicked, evil, or wilful intent to accomplish or produce the results forbidden and made punishable by the statute, and where words only are relied on to establish a violation of the statute they should be closely regarded, as the witnesses testifying that oral statements were made by defendant may have misunderstood what he said, and may have unintentionally alter-

ed a few of the expressions really used giving an effect to the statements completely at variance with what the party really did say."

* * * *

"The law presumes that every man intends the natural consequences of his acts knowingly committed, or his spoken words, or in a case like this in which a specific intent affecting the act is a necessary element of the offense charged, the presumption is not conclusive, but is probatory in character. It is for the consideration of the jury in connection with all the other evidence in the case, considering all the circumstances as you may find them, including the kind of person that made the declaration, the place at which the declarations in this case were made, the persons who were present, and all the circumstances attending them, to the end that you may judge the real intent with which they were made. In a case of this character the jury may find from the facts and circumstances, together with the language used, the intent, even though the intent was not expressed—directly expressed. In other words,

you may infer the intent from the character and the natural, ordinary, necessary consequences of the acts."

(Trans. Pp. 302, 303).

We feel that the court's instructions correctly stated the law, and, while the defendant's requested instruction might have been given, the defendant certainly cannot urge that it was error for the court not to have given the precise language asked for by him, so long as it substantially embraced what he sought.

It is contended, however, that the court should have supplemented its instructions with the warning:

> "That the jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inferences."

The court had already instructed the jury that it could only infer the intent from the character and the natural ordinary, necessary consequences of the act. We think the distinction, if any there be, too narrow and trifling to warrant further discussion.

Moreover, when requested instructions single out a particular fact or matter and emphasize it in such a way as to give improper force and meaning to it in view of all the other facts and all the material issues in the case, they should not be given, for they tend to mislead the jury.

Colburn v. U. S., 223 U. S. 596.
Weddell v. U. S., 213 Fed. 908.

(C) It is also urged that as the evidence showed that the defendant was in an angry frame of mind when making the utterances attributed to him, that the jury should have been reminded thereof and that the court should have given the following instruction, which failing so to do is assigned as error:

> "If the jury finds that the defendant made the statements alleged in Counts 1, 2, 3 and 4 of the indictment, and that said statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts 1, 2, 3 and 4."

(Assignment 21. Trans. P. 55).

As a matter of fact, there was nothing that

transpired at the trial, nor discernible from the testimony, that would warrant the requested instruction touching upon the angry frame of mind of the defendant, when making the statements charged in the indictment. The defendant when he spoke these words was on the train, coming from California, and nothing occurred that could arouse his sudden anger or passion. The conversation took place in the usual way. True, the defendant had been drinking, but the conversation originated not in anger or in heat of passion, and it continued throughout in the same way. While it might be urged that he was not cool and deliberate in his actions because he was drinking, yet, that could not be contrasted or compared with the anger which might come to a man who had been insulted. Hence, the court properly rejected the proposed instruction, particularly in view of the fact that it was without any evidence to support it.

National Enameling & Stamping Company v. Zirkobios, 251 Fed. 184.

CONCLUSION

The Circuit Court of Appeals for the Third Circuit, in the case of *Krafft v. U. S.,* 249 Fed.

919 (affirmed in 247 U. S. 520), approved the holding of the lower court that there were but two questions involved in Espionage cases, both of which were jury questions; the first being whether or not the defendant spoke the words which are alleged in the indictment and the second whether, if he did, what was the intention in his mind in speaking them.

Let us consider the Fourth count for the purpose of this argument. The defendant was charged with having made certain statements with the intent of supporting and favoring the cause of Germany and opposing the cause of the United States therein.

The Congress of the United States, during the stress of a great war, deemed it necessary, in order to safeguard the nation from dangers arising within the body of the people, to curb all seditious utterances. It, therefore, made the offense with which the defendant is charged, a crime against the United States. True, it placed certain restrictions upon the right of free people but they were restrictions that loyal American citizens, particularly those who were compelled by circumstances to stay at home, were proud

and happy to assume. True, it placed a curb upon the right of free speech, but who are the ones who complained? Not the loyal Americans! The only complaints come from pro-Germans and I. W. W.'s, who realize that by their acts and words they continually violated this law.

The Government asked nothing from Henry Albers but implicit obedience to its mandates in time of war and peril. Notwithstanding the existence of this law, the defendant gave expression to words that permit of no misunderstanding as to their nature. The defendant in his brief conceded that he made the statements so attributed to him. There is, therefore, but one question left for determination, and that is his intent in the use of these words. If it was to support and favor the cause of Germany and oppose the cause of the United States therein, he was clearly guilty of the offense. If such was not his intention, then he was not guilty. These were questions of fact for the jury to determine. The evidence concerning these questions was conflicting. The jury, after due deliberation, found the defendant guilty, consequently this court will not undertake to

disturb its verdict, unless there was no substantial evidence to justify such a conclusion.

It must be apparent from the language of this subdivision of the statute that the thing denounced presents no unusual difficulties in ascertaining whether a person is or is not guilty of that offense, but it is very simple in its scope. The word "support" means to vindicate, to maintain, to defend, to uphold by aid or countenance. The word "favor" means to regard with favor, to aid or to have the disposition to aid, to show partiality or unfair bias towards. These are the definitions given by District Judge Trippett in the case of the *U. S. vs. Shulze,* 253 Fed. 377, where a similar indictment was construed. With these definitions in mind, can it be seriously contended that there is no evidence to support the conclusion that Henry Albers intentionally had the disposition to aid and to show unfair bias toward Germany as against this country, when he made the statements he admits he made. Surely, that does not seem improbable when we consider that Henry Albers in 1914 said:

"Before we (Germany) get through with

our British cousins, we will kill every man, woman and child in England."

and in 1915 said:

"One Kaiser and one God."

and in 1917 said:

"The stories of Belgium atrocities were lies.

"The American press was dominated by the English press.

"That the American soldiers were amateurs and could not beat the Germans in a thousand years.*

*This statement was likewise made use of by Julius Rhuberg, Albers' counterpart.

and in the spring of 1918 said:

"Deutchland uber alles."

"I am a millionaire and I will spend every cent that I have to help Germany win the war.

"I am ready to be shot right now for Germany."

and again in 1918 said:

"When the German submarines get well

organized there will be no chance for boats to get across. I hope the submarines blow every British ship out of the water."

Under these circumstances, we earnestly assert that there was substantial evidence to support the verdict of guilty upon this count and that being so, the court cannot and will not undertake to overthrow the verdict that had legally been reached. To do so would merely usurp the function of the trial jury.

We have honestly endeavored in the discussion of this case to confine same to the legal merits involved, but the defendants counsel have seen fit in their brief to go outside the record and assert without right or reason that the verdict was due to the influence of passion and hate engendered by the war. The fact that upon full deliberation, the jury found the defendant guilty only upon two counts and not guilty upon the five remaining counts, must be evidence in itself that there was deliberation with due discrimination by the jury before it would consent to return any verdict at all in the case!

Counsel further elaborates with great skill

and ingenuity upon the self-serving declarations of the defendant. To assert that he has in his heart a love for this country, when at the trial counsel quite readily conceded that the defendant was strongly pro-German prior to the war and in his brief admitted that he made the statements charged in the indictment, is the basest kind of sacrilege! To assert that he showed his loyalty to this Government during the war by the liberal purchase of Liberty Bonds is but a plain subterfuge! While it may be considered a sacrifice for a poor man to invest when he has little money to spare, it certainly cannot be so considered in the case of a wealthy man with hundreds of thousands of dollars to invest and with investments made in a Government that has never repudiated a single obligation! To assert that he displayed his patriotism in his ready and willing acquiescence of his employes to enlist in the service of the United States, is an unworthy attempt to claim credit for something over which he had no control! It would indeed be an insult to the patriotism of young America to charge that their response to the colors was the result of the urging of this self-confessed pro-German, Henry Albers!

While Albers' "patriotic" endeavors, as compiled by his counsel, for the purpose of minimizing the gravity of his spoken words in defiance of law, may be of interest to a trial jury in determining its verdict, or to the trial court in fixing the punishment, it surely cannot be considered here. Suffice it is to say, that the jury, after listening to all the evidence, including Albers' self-serving declarations, decided against him, and having so found, its findings are conclusive upon this court.

Counsel in their well prepared brief, by the steady reiteration of the alleged drunken condition of Albers, by the repeated reference to the harmless, gentle character of Albers, merely seek, as they sought at the trial below, to elicit sympathy for his drunken state and forgiveness for his German soul.

One cannot help but note a striking similiarty with the method employed by the German soldiers to obtain mercy at the hands of their captors in battle. "Kamerad" was often used as we now know, as a means of striking down a too trusting foe! There is no warrant or occasion for counsel's eulogy of the patriotism of Henry Albers, nor for the appeals for sympathy

on his behalf, when one examines the record and finds out who he is and what he has done.

Henry Albers, born and grown to manhood in Germany, left that country of his own free will to come to America, the land of opportunity. He came over a stranger and we made him welcome and permitted him to enjoy the blessings of a free Government. He came over penniless and we afforded him the opportunity to enrich himself. He desired to be one of us and we, in perfect trust and confidence, conferred upon him the greatest honor that could be vested upon one who is foreign born, that of American citizenship. We accepted his oath of allegiance as given in good faith and gave him equal rights in the great inheritance of American opportunity and freedom that had been created by the sacrifice of the blood and treasures of the founders of this country.

Nothing was asked of Henry Albers but decent citizenship and adherence to the ideals and principles of American government. How has he expressed his gratitude in return for its trust and hospitality? The evidence shows that he considered his citizenship as a convenient garment to be worn in time of storm and stress;

that he betrayed the splendid trust that was reposed in him; that he not only was unwilling to manifest any devotion or patriotism for the country of his adoption and sworn allegiance, but by his words and actions supported the cause of a country with which we were engaged in a bitter struggle, a country seeking to destroy the very freedom and liberty which Henry Albers by his oath of allegiance promised faithfully to support. Thus did Henry Albers repay his obligation to his adopted country!

But, says Henry Albers, he meant no harm. True, he did say these things with which he is charged, but he was too drunk to understand; too drunk to intend injury to the Government. To advance such a contention is to admit unconcious disloyalty. How unlike the true American that he claims to be! Would a real patriotic American, even if he had been drinking, say anything that smacked of disloyalty? Would he have reviled and damned his government? Would he have praised Germany and expressed sympathy for its cause? Would he not rather, if prone to talk, extol America and damn its enemies? This, Henry Albers did not do.

It is a well known proverb, "In wine there

is truth." When Henry Albers spoke the things the indictment charges that he spoke, that the witnesses swore he spoke, he spoke what was in his heart, he laid bare his soul, revealed his innermost thoughts and gave to the world his secret that he had kept hidden from the public, but which demanded utterance when drink unsealed his lips. The liquor that he drank did not befog his mind nor paralyze his thoughts: that must be clear from the testimony of the witness, by reason of the intelligent answers he gave to the questions propounded to him that must be clear by reason of the sudden check upon his utterances when discretion re-asserted itself; that must be clear from the emphasis he placed upon his adherence to Germany. The liquor that he drank merely gave him the courage, the bravado, the indifference, to say and do things, that he, as an American citizen, knew he should not lawfully say or do.

We all surely remember the days, when with gloom and depression about us, due to the shifting of the fortunes of war, we sensed and realized that there were a number of pro-Germans about us, discreetly, but at the same time fervently, celebrating the victories of Germany and ex-

ulting in the defeat of our allies in a cause upon which depended the very existence of the land of their adoption. So Henry Albers, when drink loosened his lips, likewise exulted. His body was in America, but his soul was in Germany. Every thought in his mind and every emotion in his heart, through all these years, has been German. There is written all over him "Made in Germany." American life has not dimned that mark in the least.

In closing, we again repeat that Henry Albers said the things with which he stands charged and that in saying them, because of his German heart and German soul, he intended to show unfair bias toward Germany and to oppose the cause of the United States. That was the verdict of the jury. The defendant had a fair and impartial trial at which he was represented by most able counsel. The issues were clearly presented to the jury under proper instructions. The jury found him guilty. We, therefore, earnestly submit that its verdict should not be disturbed.

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No. 3385.

In the United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ALBERS,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon

CHARLES H. CAREY,
VEAZIE, McCOURT & VEAZIE,
Attorneys for Plaintiff in Error.

No. 3385.

In the United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ALBERS,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

With the leave of the Court the plaintiff in error respectfully submits the following to supplement his brief already filed:

Upon the hearing of this case before this Honorable Court (owing to our misunderstanding as to the length of time available for our closing argument), we left unsaid what we deem essential to a correct understanding of our view of the instructions of the District Court and the relation of those instructions to the points discussed in our brief. In our rebuttal argument we had proceeded far enough to say that the instructions were both elaborate and comprehensive. What we intended to explain further on was that however accurate in theory they may be they are misleading and erroneous as applied to the

case in hand. This explanation or qualification we deem most important lest it be inferred from what we said that the criticisms made in our brief upon those instructions were waived.

1. Our claim is that the intent with which the words laid in the indictment were uttered may be examined upon this appeal, and this is not reviewing a question of fact that was within the province of the jury. It has been decided that this may be done by the Court of Appeals even when error is not assigned on this point.

> Doe vs. United States, 253 Fed., 538.
> See also Herman vs. United States, 257 Fed. 601.

The question is, could a jury of reasonable men consider the evidence without entertaining a reasonable doubt.

In this case the Court was requested to instruct the jury for a directed verdict (256), and the refusal to do so is assigned as error.

Now the Court in giving its instructions used the following language (286):

> "The law does not forbid differences of opinion or reasonable discussion as to the causes which induced Congress to declare war or as to the results to be attained by war, or at the end of the war, nor the time and conditions under which the war should be brought to an end, nor any reasonable and temperate discussions and differences of opinion upon any or all of the

measures or policies adopted in carrying on the war. The law is limited to making it a crime to oppose by word or act the military measures taken by the United States or under lawful authority by the officers of the United States for the purpose of prosecuting that war to a successful end."

The Court also in the same connection gave the following instruction:

"The defendant is not on trial here for being of German ancestry or in sympathy with the German Government, so far as that is concerned, or the German cause, and out of sympathy with the United States Government. That is not made punishable unless he gives utterance thereto with the wilful intent that I will explain to you hereafter. He is not on trial for having criticized the American Government or the officers of the American Government or the conduct of the war. There is no law in the United States that punishes a man for his fair criticism of the conduct of the war or of the officials of the Government unless it was done with the purpose and intent that I will tell you of hereafter. In other words a man had and now has a right to criticize the Secretary of the Treasury or the Food Administrator, or the Departments of which they are the heads, if he does it with no intent to interfere with the Government in its military measures or activities."

If these instructions are a correct statement of the law then it is obvious that the case should not have been submitted to the jury at all, since the utterances of the defendant under all of the circumstances could not have been given with the intent covered by the statute.

Compare the language used by defendant with that reported in the Frohwerk case, wherein twelve articles published in a German-American newspaper after the United States entered the war were under consideration. There the language covered a wide range and was an attack upon recruiting for the army. Concerning this language the Supreme Court said:

> "It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the country is at war."

The United States Attorney points out that we admit in brief and argument that Mr. Albers used the words attributed to him by the indictment. For the purpose of the appeal it may be assumed that he said those very words, but we have not admitted and do not admit that the words so attributed to him express his mind, or that they are true. On the contrary every circumstance shows that the statements are opposed to his views, and so far as they seem to be statements of fact they are untrue.

Without attempting to review the evidence which, of course, is not our purpose in the present discussion, we cannot refrain from calling attention to the testimony, in passing, of Charles A. Barnard (208) regarding a conversation in which just a few weeks before October 8th, 1918, Albers and he discussed the war and talked of its certain outcome. To contrast the picture so given of Albers when sober with

his utterly different attitude on October 8th, when not sober, is to illustrate in a forcible manner the necessity of applying the test laid down by the Supreme Court and recognized but not applied by these instructions.

The language charged against the defendant criticizes Secretary McAdoo, expresses opinions and uses some denunciation. The few instances of phrases that purport to state any facts are contrary to the record, as "I served twenty-five years under the Kaiser and I would go back to Germany tomorrow," when as a matter of evidence he never served under the Kaiser; "I have helped Germany in this war, and I would give every cent I have to defeat the United States," whereas the record shows he never helped Germany, and all his contributions were for the United States; and "We have won the war," when at the time this was said, on October 8th, 1918, Germany was already asking terms of peace, and in contrast with the fact that the defendant on August 9th, 1918, was expressing to Mr. Barnard exactly the opposite idea (208). As the District Court well said (p. 270) in its instructions:

> "The Statute does not punish or attempt to punish beliefs. It does not punish sympathy. It does not punish opinions merely as such *unless spoken with the purpose of hindering the Government in its war activities.*"

This being the law as recognized by the trial Court itself, our claim is that there was nothing to leave to the jury, and the request for a directed verdict

should have been allowed. For there was no evidence, and no circumstance in the case from which a legitimate inference could be drawn that these words were spoken "with the purpose of hindering the Government in its war activities."

The test as stated in the Schenk case is this:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

The test comports with the general tenor of the District Court's analysis of the statutory crime; but with due respect to that Court, instead of applying the principle, and instead of declaring as a matter of law that there could be no present danger that the words used under the circumstances shown would bring about the evils, and instead of declaring that there was no such proximity, relationship or potentiality in the words as and when spoken as to make such evils probable or even possible,—instead, in other words, of taking the responsibility of telling the jury that the vital element of intent was under the conditions unthinkable, the Court left the jury to infer an intent that did not and could not exist.

> "The jury, however, had no right to find a criminal intent unless such intent was the necessary and legitimate consequence of the words spoken."
>
> Von Bank vs. United States, 253 Fed. 641.

The District Court (p. 291) reiterates that differ-

ences of opinion, reasonable discussion as to the war and the causes of the opposing governments, is not forbidden by the statute. And, although no evidence was given of the nature of the questions, answers, suggestions, expositions of theory or expressions of views of the various persons who participated in the conversation, or even of the remarks of the defendant himself on that occasion save the disjointed, disconnected and fragmentary phrases uttered by him and reduced to writing by the witnesses, nevertheless the Court proceeded to leave to the jury the question whether the defendant wilfully uttered the language imputed to him with the intent and purpose of supporting and favoring the cause of Germany in the war or opposing the cause of the United States therein, as well as the question whether "the natural or reasonable or probable tendency and effect of the words and language so spoken and uttered is to that effect, interpreted by the attending circumstances and demeanor of the defendant."

We respectfully submit that the defendant was entitled to the most favorable interpretation of these several verbal expressions imputed to him, and that without the connecting conversation they are not susceptible of any disloyal import. There was nothing from which an intent to subvert the Government or to aid the cause of her enemies could justly be drawn. At most these are but bar-room mumblings. The undisputed fact, testified to by the Government's own witness (Gaumount, p. 101-2) reveals that before these utterances were given by defendant

and noted down, the man was in such condition that it was suggested that he should be put to bed. He was put to bed, indeed, "body, boots and breeches" but not until after the notes were duly recorded in sundry note books. Not one note was made of the connecting links in the conversation extracting these expressions. The witnesses followed Captain Cuttle's plan, "when found make a note on it." They found what they went after, but were careful to note nothing but what suited their purpose.

This is beyond any reported case, and the Court erred in leaving to the jury a question of evil intent under the circumstances shown by this record. If the principles laid down in the Court's own instructions are applied, the expressions of the defendant are not such as justify a conviction.

2. The other point on which we wish to apply the principles enunciated in the instructions is in relation to the so-called collateral acts. The principles are well established by the recent cases, and yet no decided case so far as we have been able to ascertain has authorized the admission of such statements as offered on this trial, and if the Court had applied its own rule such evidence would never have gone to the jury.

The Court gave the following instruction:

> "To further explain to you the purpose of allowing testimony touching statements made by defendant at other times than the occasions charged in the indictment, I instruct you that

> it was not to prove the utterances of the language set forth in the indictment, and it should not be so considered by you, but to show the bent of defendant's mind and his attitude *as between this country and Germany,* with a view to enabling you to determine the defendant's real intention in saying and doing what the evidence convinces you that he has said and done, as it pertains to the charges made against him."

The words used by the defendant prior to the time our country was involved in the war were at most expressions of opinion, or showed prejudice against England. They did not evince any hostility to the United States, which was not engaged in the war. Most of them indeed are so remote in point of time as to have no possible connection with the war in which our country was afterward involved.

We claim that no case has or could go so far as to say that expressions of hostility to Great Britain or opinions as to the prowess of Germany in the early stages of the Great War would have any bearing upon the question of what was the attitude of mind of the defendant after this country became engaged in the war.

We respectfully point out that a citizen might be loyal to the United States and yet pro-German as between nations at war before our country became involved; and many thousand such citizens, vigorously and effectively supported the United States in our war.

The expressions testified to, for example, by Henry Cerrano (136) employed as a window cleaner for Albers Bros. Co., ought to have been excluded, if the instructions are correct. He says that in October, 1915, while engaged in that occupation he overheard Henry Albers say to a young man who was working at a typewriting machine: "Look at that paper. See what the German army are doing. The German army is doing wonderful, and France and England come very easy," and that when defendant left the room the witness heard him make this statement: "One Kaiser, and one God."

Another illustration is the McKinnon testimony (155-157). This witness under objection related a conversation supposed to have taken place in September, October or November, 1914, in which the defendant used the expression, "We will kill every man, woman and child" in England. A more prejudicial statement cannot be conceived.

Take another illustration, the statement of the witness Cushing (254), who says of the defendant, "He offered to bet witness one thousand dollars to fifty cents, and to loan witness the fifty cents, that the Kaiser could lick the world." He says this conversation occurred shortly after declaration of war between Germany, France and Great Britain.

We respectfully insist that the rule laid down by the decisions used by the Court itself in its instructions is stretched beyond all recognition.

Our purpose in filing this supplemental brief is not to discuss the various points we have made and fully argued in our former brief. Our object here is simply to answer some of the suggestions of the United States Attorney made in his brief and upon the argument, and to explain the application of our oral statement regarding the elaborate instructions given by the Court.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

No. 3385

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ALBERS
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA
Defendant in Error

Petition for Rehearing of Plaintiff in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon

JOHN McCOURT and
CHARLES H. CAREY
Attorneys for Plaintiff in Error

No. 3385

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HENRY ALBERS
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In applying for a rehearing in this case, we submit our suggestions with a deep sense of the importance of the question discussed, not only as respects this defendant but to the country. The issue is one that involves the liberties of the people, and the rule now adopted will either open the door to the encroachment upon valued rights and make future prosecutions for political offenses the means of oppression, or will reassert the time hon-

ored principles of law long recognized as the safeguard of the rights of persons accused.

Our country has been passing through a period of war when patriotism was at white heat and men's passions and prejudices were strongly excited. But as Judge Pritchard said in the Hall case (256 Fed. 752):

> "In a time like this when patriotism is at a high pitch, and many people have to a certain extent lost their mental poise, courts and jurors should be extremely cautious when required to pass upon the rights of an individual charged with an offense affecting the welfare of the government."

The crisis is over. The country is now rapidly returning to the paths of peace, and the excitement and strain of the war period relaxes. We can now view with calmness, and discuss with candor and without passion or prejudice, questions of historic fact that are already taking proper place in the perspective of the past. And in the application of legal principles to specific cases a time has come when advocates at the bar may temper their enthusiasm in their clients' interests, while judges in the courts, as well as teachers and students of the philosophy and the theory of the law, may survey the recent past and satisfy themselves that the war has not changed the fundamental rules long established for the protection of persons accused. In the evolution of the common

law it is to the courageous judges that liberty owes its protection. The rules of evidence in criminal cases have often been established by great judges in defiance of governments and in spite of the argument of expediency. One of these rules is that which confines the evidence to the exact offense charged in the indictment and the variation and exception to this rule that is sparingly permitted in certain circumstances is limited, as indeed it should be if prosecutors are to be held within bounds and accused persons, especially persons accused of political offenses in times of stress and prejudice, are to have any protection.

Since the opinion of the court in the Albers case we have again examined the origin and history of the exception to the general rule above referred to, and have read carefully as many reported cases as the time has permitted. We respectfully submit this memorandum, believing that it may aid the court. We are firmly convinced that the Albers case extends the boundary of the law and will be dangerous to liberty as a precedent.

1. "OTHER STATEMENTS" IN THE ALBERS CASE.

The other statements attributed to Albers were thus described in the opinion:

> "There was, however, upon that vital and close question of intent, introduced in evidence testimony of two witnesses, David McKinnon

and Henry Cerrano, the former of whom was permitted to and did testify, among other things, that a few months after the beginning of the war, fixing the time as September, October or November, 1914, he met and had a conversation with the defendant on a street in the City of San Francisco, California, during which the defendant brought up the subject of the war, asking the witness what he thought of it, to which the latter replied that he did not wish to have much to say about it, was very sorry it had occurred, and thought it too bad that national disputes could not be settled in other ways than by bloodshed, whereupon the defendant said to the witness:

'What do you think of our British cousins?' To which the witness replied, 'No British cousins of mine nothing of British who are cousins of mine.' That the defendant then said to the witness: 'Never mind; before we get through with them we will kill every man, woman and child in England.'

The witness Cerrano was permitted to and did testify, among other things, that he was janitor of Albers Brothers (of which company the defendant was the head), and that some time prior to October, 1915, he was cleaning windows in the office of the company when the defendant entered with a German-American paper and gave it to a young man who was working in there, saying:

'Look at that paper See what the German army is doing. The German army is doing wonderfully and France and England come very easy'; and added: 'One kaiser and one God.'"

We would add also that there was an opinion testified to by Cushing (254) who said that he had a conversation with defendant shortly after declaration of war between Germany, France and Great Britain, and said: "He offered to bet witness one thousand dollars to fifty cents, and would loan witness the fifty cents, that the kaiser could lick the world."

We would also call attention to the fact that there were no other statements of a continuing character or acts of any kind in the evidence between the dates above indicated and a month before the close of our war, October 8th, 1918; and the statements were not accompanied by any evidence of any kind (excepting the drunken talk on the latter date) that showed or tended to show that defendant adhered to the views therein expressed in the interval or during our war, or showed or tended to show that they were in any manner connected with the crime charged in the indictment.

2. THE ADMISSIBILITY OF "OTHER STATEMENTS."

The opinion, in discussing this evidence, says: "The question is, was it too remote?" and proceeds to show that in the Equi case other statements and acts two years prior to the act and speech charged in the indictment were held not too remote.

We shall not argue the question of what lapse of time is necessary to make other statements too remote. We will assume that this must necessarily be more or less a judicial question to be determined in the exercise of a wise discretion, although the Albers case seems extreme in this particular. We find in such decisions generally such expressions as "about the same time," "at or about the same time," "closely connected in point of time," and the like. The interval of time in the Albers case is longer than in any reported case that has come to our attention, and is particularly exceptional in that there was no connecting series of similar circumstances during the interval. Statements made in 1914 and 1915 by Albers were not part of a continuing series of similar statements to the date laid in the indictment.

But our criticism of the Albers case does not rest here.

Our point is (and we respectfully urge that the opinion does not touch upon this most vital point) that the remoteness or irrelevancy that should exclude these other statements lies chiefly in the fact that they are not germane to the matter charged in the indictment.

3. STATEMENTS MUST BE GERMANE AND RELEVANT.

The earlier statements were manifestly not made with "the intent to incite, provoke or encour-

age resistance to the United States," for the United States was not mentioned nor was the United States at war. The expression of hostility to England, or even of admiration of the German army or the German kaiser, prior to our being in the war, cannot by any conception be deemed "like" or "similar" statements that would show intent or state of mind upon a wholly different subject after the country is at war. The indictment charged that the defendant "uttered language intended to incite, provoke, and encourage resistance to the United States."

The question of remoteness, therefore, is not a question of time only, as discussed in the opinion. This is a case where totally incongruous and unrelated statements are admitted under the mistaken assumption that they are like or similar statements, and in this we think the opinion has enlarged upon the exception to the general rule against other acts and offenses. This opinion is revolutionary, if we may be permitted to use a word which will not be considered extreme after the examination of the authorities; or perhaps we should rather say that the court has had its attention fixed upon the question of remoteness in point of time and has inadvertently overlooked the other and more essential requirement of all decided cases, including the Equi case itself, that the admitted other statements or other acts must be (1) other

criminal offenses of like character to the one charged, or (2) other acts or utterances showing or tending to show an intention or tendency to commit the specific crime charged in the indictment. These two classes will be found to cover all of the heretofore decided and reported cases in which this exception to the rule of relevancy has been allowed, and of course although it is now well settled that the espionage cases are cases where the exception is authorized, it will not be forgotten that the group of crimes embracing a class where the exception is authorized is jealously limited and guarded by the courts in the interest of common justice.

Now when the Albers other statements were made there was not only no espionage act and hence no possibility of "an offense of like character" under that act, but the war between Germany and the United States was not in existence. It was after those statements in fact that President Wilson was reelected on the "He kept us out of the war" slogan. The other statements therefore by no human conception can be said to fall into the second class of statements showing or tending to show an intention of committing the crime charged in the indictment, an essential ingredient of which was as there alleged "the intent to incite, provoke or encourage resistance to the United States."

That intent was the intent mentioned by the trial court in its instructions to the jury upon this very evidence, *"to show the bent of defendant's mind and his attitude as between this country and Germany."*

It is expressed in the opinion of the learned and conscientious judge who spoke for the Court of Appeals in this way:

> "In admitting the testimony the court distinctly ruled that it was admitted as tending to show the bent of *the defendant's mind and his attitude as between the United States and Germany*, with a view to enabling the jury to determine the defendant's real intention in saying and doing the things with which he was charged, and for that purpose only; and in its charge to the jury the court also specifically and clearly so limited it."

In these judicial expressions both trial and appellate court have realized that the defendant's attitude as to the United States is the crucial test, but both have assumed without deciding it that a pro-German attitude of mind in 1914 might or could indicate an anti-United States attitude of mind then or afterwards.

Our claim is, therefore, that error was committed in admitting these statements:

(a) Not because we were not then at war with Germany, but because they did not show or tend to show hostility to the United States or to obstruct its purposes.

(b) Not because the espionage acts had not yet made acts and utterances crimes, but because these other statements did not relate to any crime defined in the subsequently adopted statute or tend in any way to show what the attitude of defendant's mind would be as to committing any such crime.

(c) Not because in point of time the statements were remote, but because as related to the things described in the indictment they were both remote and irrelevant, having nothing whatever to do with the condition of war between the United States and Germany or the attitude of mind or possible intention of defendant should such condition arise.

4. A REVIEW OF THE RECENT CASES.

We propose now to present a review of the espionage cases reported in the Federal Reporter bearing upon this exception to the rule of evidence, and to show not only the limit heretofore recognized, but that the decision in the Albers case is unsupported by authority. We have examined many English and American authorities of the earlier periods, especially those collected by Judge Gilbert in the Schulze case (259 Fed. 189), and have examined the authorities cited by the various courts whose opinions are reviewed in this brief. It is manifestly impossible to analyze all of these authorities in such a brief as this, but we have

found no case, English or American, that extends the exception relating to "other crimes" or "other statements" or "other acts" so far as the Albers case.

Under these circumstances the court will recognize that counsel feel that the importance of the case as a future precedent justifies our asking a new consideration of the point, and a discussion by the court of the principles involved. It by no means satisfies to dispose of such an important question in criminal jurisprudence by a general order that a rehearing is denied, or to have the opinion make reference to the Equi case as controlling in relation to the lapse of two years of time between the "other statements" and the time of the commission of the alleged offense. We know that the Equi case and the Albers case were in the courts at the same time and the decision of one may have influenced the decision of the other; but they are totally unlike, excepting that both arise under the espionage act.

CIRCUIT COURT OF APPEALS—FIRST CIRCUIT.

In the Coldwell case (256 Fed. 805, 811) the circulars admitted in evidence contained advice "not to register, and against conscription." This went to the very heart of the indictment, which was for obstructing the recruiting and enlistment service of the United States by means of an oral speech of like character at a public meeting.

CIRCUIT COURT OF APPEALS—FOURTH CIRCUIT.

The Kirchner case (255 Fed. 301) does not set out the particular "other statements" of similar character that were held admissible, but the indictment itself charged "certain false statements *regarding the United States Government, the army of the United States, the bonds of the United States*, then being offered to the citizens of the United States," etc. The opinion of Judge McDowell simply says on the point in question (p. 304):

> "It is next urged that the trial court erred in admitting evidence of statements *similar in nature* to those set out in the indictment, made by the defendant in the Southern District of West Virginia and before the espionage law was enacted."

If "similar in nature" the statements must necessarily have been regarding the United States Government, or the army of the United States, or

the bonds of the United States. They could not have been of similar nature if they related to England or to Germany before the war and were not statements of the kind or character described in the indictment.

In the Hall case (256 Fed. 748) under four counts in an indictment covering making and conveying false reports with intent to interfere with the military operations of the United States; attempting to cause insubordination in the military and naval forces; obstructing recruiting and enlistment; and making false statements and false reports with attempt to obstruct the sale of bonds, the Circuit Court of Appeals held that threats made against the President and expression of desire to get an opportunity to put a bullet through Woodrow Wilson's heart, were not admissible. Yet as these expressions related to the President of the United States, they would evidently be less remote and much more likely to show an intent than the expressions attributed to Albers relating to England and Germany showing no hostility to the United States or its officers.

CIRCUIT COURT OF APPEALS—SEVENTH CIRCUIT.

In the Kammann case (259 Fed. 192), the indictment contained twenty counts under the espionage act. Ten counts set forth statements willfully

made with intent to interfere with the operation and success of the military forces of the United States; the other ten alleged that the same utterances were wilful attempts to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces. In that case it was held that expressions of defendant before the United States was at war, though showing a siding with Germany as against the Allies, was error.

On the question of admissibility of other statements, we quote the following pertinent language of Judge Baker:

> "It is unnecessary in this case to measure the limits of the admissibility of evidence of prior acts or utterances similar to the acts or utterances charged in the indictment, as discussed in 1 Wigmore, Secs. 300-306, 3 Greenleaf (15th Ed.) Sec. 15, 1 Jones, Sec. 144, 16 Corpus Juris, 586, and 7 Ency. of Evidence, pp. 629, 633; for the gist of the indictable offense here was the criminal intent to interfere with our military operations or to cause insubordination among our military forces. While we were neutral, Kammann's 'mental attitude,' as the trial court characterized the effect of this evidence, was no more an offense than was the 'mental attitude' of other American citizens who expressed their belief in the cause of the Allies. Of course no one can lawfully be convicted under the act of June 15, 1917, merely on account of his 'mental attitude' (proven necessarily by his expressions) since that date. But if there was a *prima facie* case to go to the jury, it is apparent how damaging it would be to allow a close or doubtful

case to be bolstered up with proof of expressions which are not fairly attributable to an intent or a willingness to interfere with our military operations or to cause insubordination among our military forces as proof of an intent to violate those commands of the espionage act when it should come to be enacted. That would virtually be giving an *ex post facto* effect to the statute itself.'

"We hold that the evidence of Kammann's expression while we were neutral, though showing a siding with Germany as against the Allies, could not fairly be attributed to an intent or a willingness to interfere with our military operations or to cause insubordination among our military forces, and its admission was prejudicial error."

COURT OF APPEALS—EIGHTH CIRCUIT.

The circulars admitted as "other acts" in the Doe case (253 Fed. 903) were of "similar import" to the one set out in the indictment. "The circulars other than the one set forth in the indictment were circulated about the same time as the former," and were offered for the purpose of showing intent.

The Heynacher case (257 Fed. 61) relates to the admission in rebuttal by the government of a statement in a letter of the accused, which came in as part of the cross-examination of the defendant. This case has no bearing upon the question now under discussion.

In the Wolf case (259 Fed. 388) evidence of prior statements was rejected. The court said:

> "Ordinarily such statements made only a few weeks prior to those covered by the indictment would be evidence bearing on intent, since it would tend to show his state of mind, which is presumed to continue. *But it cannot be presumed that a state of mind entirely lawful at the time and not accompanied by expressions showing a willingness to violate law, will change into a criminal intent under a future statute.*"

The reported case does not quote the words under consideration, but if they included a denunciation of the United States or tended to cause disloyalty or to obstruct recruiting as laid in the several counts of the indictment they would be admitted under the rule of evidence adopted in this Circuit even though uttered before the espionage act was in existence; but certainly if they did not either mention the United States or relate to any crime charged in the indictment they ought to be excluded in any view of the law.

CIRCUIT COURT OF APPEALS—NINTH CIRCUIT.

The syllabus in the Rhuberg case (255 Fed. 865) states this point therein decided:

> "On trial of a defendant for violation of espionage act, Sec. 2 (Comp. St. 1918, Sec. 10212c), by making statements intended and calculated to obstruct the recruiting and enlistment service, evidence of statements made by him before the United States was at war, tending to show his attitude toward Germany

and this country, and limited to that purpose, *held* properly admitted."

An examination of the statements and the indictment show that the former related to the very charges of the indictment, and were indeed like statements. They included the following:

> "He then said that Germany was perfectly right in sinking the Lusitania; that ships carrying contraband of war, with passengers on them who had no more sense than to ride in time of war, ought to be sunk; that if this country got into the war Germans in this country would rebel against this government; that this country was in no shape to fight the German government; that we were so slow that Germany would have the Allies licked before we got ready to fight, and then come to the United States; that Germany was in the right, and she was bound to win; that the German government always took the right side to everything; that they never lost a war, and they never would."

These statements though made before the war are totally unlike the Albers statements in showing the defendant's attitude as hostile to the United States and its policies as charged.

In the Shafer case (255 Fed. 886) the evidence showed that numerous identical books were mailed, one copy of which was referred to by description in the indictment. The evidence of the mailing of other copies seems to have been received without reference to the question here under discussion,

as of course it should have been in any view of the rule of relevant other acts, and the case therefore has no bearing.

In the Herman case (257 Fed. 601) the circulars, pamphlets and correspondence and the oral statements admitted in evidence in a prosecution for publishing a false circular to interfere with the operation and success of the military and naval forces of the United States, related directly to the matter charged in the indictment. The court remarked as to the admitted oral statements that this evidence "all tended to show the mental attitude of the defendant and had its bearing upon the question of his intent," and while these statements are not quoted in the opinion it may be assumed that like the circulars, pamphlets and correspondence admitted they related directly to the particular charge in the indictment, namely, interfering with the operation and success of the military and naval forces of the United States or promoting the success of the enemies of the United States. No one can read the carefully guarded language of this opinion without perceiving the vast difference between this case, where the admitted evidence *related to the exact crime charged in the indictment*, and the Albers case where the admitted evidence does not relate to the United States at all or to any charge in the indictment.

The report in the Shidler case (257 Fed. 620)

does not disclose the words of the statements that were admitted in evidence, but the indictment covered a wide range in four counts, and it must be assumed that the statements did relate to one or more of the crimes charged.

The Sandberg case (257 Fed. 643), while not in point as to "other statements," relates to statements made by the defendant showing strong bias in favor of Germany. These statements were held insufficient to sustain conviction under the act and are referred to here for purposes of comparison with the statements in the Albers case.

In the Schulze case (259 Fed. 189) other acts or words are held admissible to show defendant's attitude of mind and intent or purpose. The admitted other acts and words related to the crime charged and tended to support or favor the cause of a country with which the United States was at war, and to oppose the cause of the United States.

The citations collected in this opinion correctly state the rule and the exception, and certainly fall far short of sustaining the Albers decision.

The Equi case (261 Fed. 53) assumes a position of supreme importance in this list of decisions, for the reason that it is the only authority cited in the Albers opinion. In this opinion it is said:

> "It is manifest a like ruling must be made in the present case unless the Equi case is to be overruled, which we are not prepared to do."

But the Equi indictment covered several counts and the other acts and statements admitted on the trial related exactly and specifically to the very essence of the crimes so alleged. These other acts and statements were bitter attacks upon the United States:

(a) Actions of Dr. Equi on the occasion of the Preparedness Day parade, June 3, 1916, tearing up the American flag, carrying a "Prepare to Die" banner and a banner calling the soldiers scabs.

(b) Speeches of Dr. Equi at the Plaza Block, September and October, 1917, denouncing the army, the bond sale, and the war.

(c) Speech at I. W. W. Hall, June 1, 1918, opposing the war and advocating the red flag.

The first of these occurrences is the only one of the series that was before the war, and in the circumstance that it happened before the war began there is a certain resemblance to the Albers case, wherein statements made before the war were admitted. But there the similitude is at end. The actions, words and conduct of Dr. Equi on that occasion introduced upon the trial (as will be seen by reference to the appendix of this brief where excerpts from the brief of the United States attorney in that case are copied) showed a hostility to preparedness, to the army, the flag, and there-

fore to recruiting and enlisting an army for the United States, as charged in the indictment.

The indictment in the Equi case is fully set out in the report, and covered the very kind of acts and statements of that defendant that were held admissible on the ground that they were similar. Indeed, they were almost identical. They were so alike that by a change of date of the offense laid in the indictment they would read as the very acts and statements plead by the government. Their remoteness, if it existed, was in time and not in substance. The Equi case definitely holds that statements made two years prior to the acts alleged in the indictment are not too remote in point of time, and therefore may be considered as having occurred "at or about the same time" as the expression goes in this class of cases.

But although it is cited in the Albers case on that point as though controlling, we respectfully urge that the essential reason why the other statements in the Albers case should be excluded is not mere lapse of two years' time but a total lack of apposition or application, and a total lack of any intervening or connecting circumstance. Time, isolation and lack of application to the crime charged, all combined in the Albers case make the Equi case clearly distinguishable under the authorities.

The Albers statements showed no hostility to the United States, nor to its war, its flag, its en-

listment and recruiting, its army or navy, or to its cause, or to its officers, or to its government. On the other hand, the statements showed nothing from which anyone would be justified in saying that in case of war two or three years afterward Albers would be found an enemy of his chosen country; so it is not within the scope of the Equi case as a precedent.

True, the Equi Preparedness Day occurrence was before the United States was at war, as were the Albers statements. But the Equi occurrences were relevant notwithstanding, because they pertained to the subject matter of the crime and bear directly upon the indictment. The circumstance that they were before the war was to be considered in the same light perhaps as were the statements in the Kirchner case, where the statements were before the espionage act was passed. That would not agree with the principle elucidated in the very excellent case of *State v. Wenzell*, 72 New Hampshire 396, where it was shown that an illegal intent cannot be inferred from a previous legal act, but to go a step further as in the Albers case and to hold that non-criminal "other statements" uttered before the war, and before the statute was adopted, and that do not relate to the United States at all, may be considered by the jury upon a question of intent hostile to the United States, is to apply the Equi case where it is not an authority; it is to drag

in irrelevant, remote, isolated and unrelated previous declarations contrary to all precedent and in violation of the plainest principles of justice and law. And upon such a rule no defendant would ever be safe from unjust conviction.

In the Magon case (260 Fed. 811) evidence of other offenses, speeches and other publications of defendant, "unquestionably seditious and anarchistic," were held admissible on the question of intent; but they were each published by the defendant after the war began as a part of propaganda in which the anarchistic manifesto described in the indictment was published.

In the Partan case (261 Fed. 515) the other books and newspaper articles that were admitted were published and distributed after the United States and Germany were at war, and they seem to have been of like character to the publication described in the indictment.

SUPREME COURT.

In the Debs case, decided by the Supreme Court March 10, 1919 (U. S. S. C. Adv. Opinions No. 10, Apr. 1, 1919, p. 309), the "Anti-War Proclamation and Program" that was received in evidence was "coupled with testimony that about an hour before the speech the defendant had stated that he approved of that platform in spirit and in substance." The defendant referred to it in his address to the

jury seemingly with satisfaction and willingness that it should be considered in evidence, but his counsel objected, etc. The proclamation contained a recommendation of continuous, active and public opposition to the war, which was the very thing the defendant was charged with in the indictment. The court said:

> "Evidence that the defendant accepted this view and this declaration of his duties at the time he made his speech (covered by the indictment) is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books."

N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 598, was a fraud case. The following quotation serves to show the true principle in many applications to civil suits:

> "The theory of the defense is, that the purpose of Hunter in obtaining the insurance was to cheat and defraud the company. In support of that position evidence that he effected insurances upon the life of Armstrong in other companies at or about the same time, for a like fraudulent purpose, was admissible. A repetition of acts of the same character naturally indicates the same purpose in all of them; and if when considered together they cannot be reasonably explained, without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act. A creditor has an insurable interest

in the life of his debtor, and may very properly procure an insurance upon it for an amount sufficient to secure his debt, but if he takes out policies in different companies at or nearly the same time, and thus increases the insurance far beyond any reasonable security for the debt, an inquiry at once arises as to his motive, and it may be considered as governing him in each insurance. In *Castle v. Bullard*, 23 How. 172, 186, where the defendants were charged with having fraudulently sold the goods of the plaintiff, evidence that they had committed similar fraudulent acts at or about the same time was allowed, with a view to establish their alleged intent with respect to the matters in issue. The court said: 'Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration.' In *Lincoln v. Claflin*, 7 Wall. 132, an action was brought for fraudulently obtaining property, and evidence of other frauds of a like character, committed by the defendants at or near the same time, was held to be admissible. 'Its admissibility,' said the court, 'is placed on the ground that where transactions of a similar character executed by the same parties are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in *Cary v. Hotailing*, 1 Hill 311, and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge.' In *Butler v. Wat-*

kins, 13 Wall. 456, 464, speaking on the same subject, this court said: 'In actions for fraud large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at or about the same time and in relation to a like subject, was actuated by the same spirit.' In *Bottomley v. United States,* 1 Story 135, 144, Mr. Justice Story held the same doctrine, and cited several instances of its application.

"Thus, in the case of a prosecution for uttering counterfeit money, the fact that the prisoner has in his possession or has uttered, other counterfeit money, is held to be proper evidence to show his guilty knowledge; and upon an indictment for receiving stolen goods, evidence that the prisoner had received at various other times different parcels of goods which had been stolen from the same persons is held admissible in proof of his guilty knowledge. So, on an indictment for a conspiracy to create public discontent and disaffection, proof is admissible against the prisoner that at another meeting held for an object professedly similar, at which the prisoner was chairman, resolutions were passed of a character to create such discontent and disaffection. 'In short,' said the learned justice, 'wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, tending to establish such intent or knowledge, are proper evidence. In many cases of fraud it would be otherwise impossible satisfactorily to establish the true nature and character of the act.' Many other authorities might be cited to the same purport.

"The evidence offered that Hunter obtained insurances in other companies on the life of Armstrong at or near the same time was, under these authorities, clearly admissible. It tended to establish the theory of the defendant that the insurance in this case was obtained by Hunter upon the premeditated purpose to cheat and defraud the company. Especially would it have had that effect if followed by proof of the manner of the death of Armstrong."

CASES NOT UNDER THE ESPIONAGE ACT.

In *Byron v. U. S.*, 259 Fed. 371, which was a case of using the mails to defraud, evidence that another similar plan was carried out by the defendants was offered. This evidence was admitted solely for the purpose of aiding the jury in ascertaining the intent of the defendants in their conduct in the case on trial. For that purpose and under such limitations it was competent. But it will not be necessary to call attention to the fact that the plan was similar to that laid in the indictment.

In *Riddell v. United States*, 244 Fed. 695, a case of using the mails to defraud, a continuous scheme was shown, and it was held that outlawed similar acts of criminal character might be proved. It will be noticed that in this and in each of the several cases cited and relied upon in the opinion the similar acts were of a criminal character like those charged, and none of them goes so far as to hold

that a criminal intent can be inferred from a lawful previous act or statement.

The Byron case, *supra*, cites the Hallowell case (253 Fed. 865), also a postoffice case. The letters were held to be admissible, "as not foreign to the scheme so charged" (in the indictment) and as containing statements tending to prove the criminal conspiracy, as well as to prove intent. But on the latter point the relevancy of the letters to the crime charged is the very basis of the legal principle on which they were to prove intent, or otherwise they would not have been relevant to the indictment.

This was also the situation of letters received in the Farmer case (223 Fed. 903, 911), which were admissible as showing intent and casting light upon the methods of the scheme devised and described in the indictment.

And in the Stern case (223 Fed. 762, 764) "the other transactions proved were in the same business and done in the same way with the same result."

The other statements admitted in the Sprinkle case (141 Fed. 811) were part of the *res gestae* of the alleged crime, and all of the facts and circumstances, including the acts of the accused, were admissible on the question of intent, but the court took care to say that "they should, of course, be the necessary incidents of the litigated act."

And finally, in the Shea case (236 Fed. 97), the exact point is beautifully illustrated by the contrast of evidence of like criminal acts of same character closely associated in point of time and circumstance which was admitted on the question of intent, and other criminal acts which were held inadmissible because not restricted to the consideration of intent. The second fraud shown by the evidence in that case was "of an entirely different nature than that charged in the indictment, and was thus directly within the general rule which forbids proof of the commission by defendants of crimes distinct and independent of the crime charged." All of which seems to make clear that "other acts" that are not of a criminal nature at all, and which do not relate to the particular act charged, are even less to be considered relevant or admissible upon the question of intent to commit the offense charged in the indictment.

In the case of Kettenbach (202 Fed. 377), arising under the National Bank Act, other transactions of similar character were admitted to show motive and intent. This evidence tended to show a uniform system of annual reports similar to the falsification of the reports which was charged in the indictment. The admissibility of such evidence is not doubted as it was evidence of transactions of the kind alleged in the indictment and sought to be proved by the government.

It is not our purpose to extend this brief by a review of cases from the state courts. We quote, however, from one such:

> In *Paulson v. State* (118 Wis. 89) the Supreme Court of that state had occasion to decide that evidence of former crimes attributed to the accused were not admissible. In discussing the legal principle, the court said:
>
> "An exception is indulged where other crimes are so connected with the one charged that their commission directly tends to prove some element of the latter, usually guilty knowledge or some specific intent. We mention this exception merely for accuracy, to qualify the generality of the foregoing statement. *It obviously can have no application to such remote and disconnected facts as those here presented. The cases in which overzealous prosecutors have trespassed upon this rule, so that appellate courts have had occasion to give it reiteration, are almost without number.*"
>
> In that case the court says that the examples cited are not given so much to establish the rule that evidence of such remote acts is irrelevant and therefore inadmissible, as to show how uniformly courts have held that one cannot be deemed to have had fairly tried before a jury the question of his guilt of the offense charged, when their minds have been prejudiced by proof of bad character of the accused or former misconduct, and thus diverted and perverted from a deliberate and impartial consideration of the question whether the real evidentiary facts fasten guilt upon him beyond reasonable doubt. The court adds:
>
> "In a doubtful case, even a trained judicial mind can hardly exclude facts of previous bad character or criminal tendency and prevent

its having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect."

CONCLUSION.

We must own that we are disappointed that in the opinion the court did not see fit to discuss the point made in the brief as to the necessity of appropriate allegations in the indictment to show that the words charged therein were in the German language, with translation. (See the indictments in *Balbas v. United States*, 257 Fed. 17, and *Magon v. United States*, 260 Fed. 811, recent decisions not cited in our former brief on this point.) And also that the court did not take the responsibility of deciding that the circumstances under which the words set out in the indictment were uttered make it inconceivable that the statutory intent could exist. On the latter point may we ask if the court has considered that the testimony of the government's own witness (Gaumont, p. 101-2) showed that *before these utterances were given by the defendant the latter was so drunk that it was suggested that he should be put to bed.* We beg the court to reconsider the case upon this point. The court in its opinion has said:

> "No one, we think, can read the testimony of the running conversations which occurred in the smoking compartment of the Pullman car, between the defendant to the indictment and the other persons therein named, and in

> which conversation the prohibited and disloyal words were spoken by the defendant, in connection with the further undisputed fact that the latter had ultimately to be assisted by the porter of the car to his berth and put into the bed with his clothes and shoes on, without seeing that he must have been very drunk."

And while the court says that whether he was too drunk to know or realize what he said when he uttered the prohibited and disloyal words was the real question in the case, it has, notwithstanding Gaumont's testimony, been content to abide by the decision of the jury that there was and could have been an illegal intent in uttering the words. If this is because it is deemed that the court is bound by the obviously prejudiced verdict where there was a controverted question of fact, then we take the liberty of calling attention to the Herman case (257 Fed. 601) and the Doe case (253 Fed. 905) to show that the Court of Appeals may and should see that an unjust verdict does not stand.

To quote from the Doe case:

> "The question of the sufficiency of the evidence to sustain a verdict of guilty on the count under consideration was not raised in the trial court but we are asked to consider it although not so raised. It is within the sound discretion of the court to notice the claim of counsel that there was no evidence to sustain the verdict of guilty although this question was not raised in the trial court." (Citing cases.)
>
> *Doe v. United States, supra.*

We take it that the opinion expressed by some of the government witnesses that Albers was not too drunk to understand and intend what he was saying is after all an expression of opinion, and there was little or no conflict of testimony on the real facts; and on the whole record, and considering Albers' history, the conclusion that such an utterly inebriated man had the guilty intent alleged in the indictment is incredible to unprejudiced persons.

At the expense of repeating what was perhaps sufficiently covered in our former brief and arguments, we ask again the court's particular attention to the testimony of the government witness Gaumaunt above referred to (pp. 101-2), especially the following passage:

> "Defendant had been drinking. He believed there was a bottle there on the seat. Albers was sitting down. Defendant's speech about McAdoo was plain; yes, sir. He heard it plainly. After that remark was made he didn't participate in any conversation outside of asking Mr. Kinney who the man was, and didn't he think defendant better be put to bed. This was right after he made this remark. Witness said this right in the room in the presence of Mr. Albers. Nothing else took place, only Mr. Kinney said he thought—he didn't believe in putting a propagandist to bed, or something to that effect, and witness asked Mr. Kinney if he knew who the man was and he said he didn't."

This was corroborated by the defendant's witness Richard K. Clark, porter of the car, who testified that he saw Deputy Marshal Tichenor making his notes of the conversation just after he (Clark) had put Albers to bed. He also says that the Deputy Sheriff Gaumaunt furnished Albers with the liquor to incite him to make the objectionable statements. We quote as follows (pp. 175-177):

> "Mr. Albers had been drinking pretty heavy all day and that evening, after these men surrounded him, witness knew the condition defendant was in and he wanted to get his whiskey away from him, and so about 9 o'clock he went to try to get Mr. Albers to go to bed, and he took his grip from the washroom to his berth and after he had done this this man Gaumaunt came and said he wanted that grip. He said, 'I want that grip.' He says, 'There is something in it I want to get out of it.' Witness said, 'What do you want with it?' He says, 'Something in it I want to get out, something in there I want.' And witness said, 'What authority have you to want this man's grip?' He says, 'Well, I am an officer.' Witness said, 'Well, you will have to show me if you are an officer,' so in the meantime the Pullman conductor came along and witness says to the conductor, 'How about this man? He claims he is an officer and wants this man's grip. What shall I do about it?' The conductor said, 'Well, let him have the grip.' In the meantime Gaumaunt showed witness some kind of a little badge. Witness didn't know what it said on it. Gaumaunt said that was his authority, he was an officer. He showed witness some kind of a badge. Gaumaunt didn't

say anything at that time excepting that he wanted the grip, there was something in it. Later he said the only way to get a German to talk was to get him full; get him full of whiskey. Witness thought that was all that he heard at that time. . . . When defendant went to bed he was stupified from drink. Witness put him to bed. After he got him down to the berth the brakeman helped him. Defendant wasn't able to take his clothes off when he put him to bed that night. He slept in his clothes, to the knowledge of witness, as far as he knows. He wasn't able to take his shoes off. Slept in his shoes. Witness saw Mr. Tichenor making notes after he put defendant to bed and after they had taken his grip back. He saw Tichenor making notes when he went and put defendant to bed finally —the last time. He was making notes then, yes, sir, writing it down. There was two or three of them with him. This man Mead and Gaumaunt and Mr. Kinney. Witness thought there was another man, three or four of them. Mr. Tichenor was writing it down and they were all around him. Witness thought they were giving the information and the writing was done by Mr. Tichenor."

In the recent case *Skuy v. United States* (261 Fed. 316, 320), which, however, was a case that involved a different point of law, Judge Sanborn, speaking for the Court of Appeals, said:

> "And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception or assignment."

Albers has been unjustly convicted, and has been given a sentence that would be severe for a hardened criminal or a dangerous anarchist or enemy of the country. He appeals to the court not for mercy but for justice. If we have, as we believe, found a feature of his case not discussed or decided in the opinion, namely, the admission of dissimilar utterances under the rule that sometimes admits similar statements, we will hope that we may have a frank and candid expression and a judicial survey of the authorities. Numerous illustrations from these are collected in Thompson on Trials (1889 Ed.), Secs. 329-335, and quotations from many eminent judges stating the principle for which we contend would be given if space would permit, all of which may be summed up in the sentence of Chapman, C. J., in *Commonwealth v. Choate* (105 Mass. 451, 458): "The principle is, that all the evidence submitted must be pertinent to the point in issue."

Respectfully submitted,

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APPENDIX.

(The following from the record of the Equi case is offered to show that the other acts and statements in that case related directly to the matter set out in the indictment and were therefore *similar*. Although a portion thereof occurred two years before the date laid in the indictment, it was a part of a series of similar occurrences after the war and after the adoption of the espionage act to and including the date in the indictment):

> "The indictment in this case charges a violation of section 3 of espionage act June 15, 1917, c. 30, tit. 1, 40 Stat. 219, as amended by act May 16, 1918, c. 75, sec. 1, 40 Stat. 553 (Comp. St. 1918, sec. 10212c). In general terms the charge is that the plaintiff in error on June 27, 1918, while the United States was at war with the imperial German government, at a public meeting in a hall of the Industrial Workers of the World in the city of Portland, state of Oregon, in the presence of certain persons named and a large number of other persons to the grand jurors unknown did willfully, knowingly and unlawfully, and feloniously state in substance and to the effect as follows, to-wit: . .
>
> "(1) That she (meaning the said defendant) and all of her fellow workers (meaning the members of the Industrial Workers of the World) were not fighting for the flag containing the *red, white and blue*, nor the British flag, nor for a flag of any country, but that the fellow workers and the I. W. W. platform (meaning the members and platform of the Industrial Workers of the World) stood for the

industrial flag, the red banner that stood for the blood of the Industrial Workers.

"(2) That the ruling class had been in power long enough, with the law and the army and navy behind them, and that they (meaning the members of the Industrial Workers of the World) knew that there were fellow workers pulled into the army against their wills, and were placed in the trenches to fight their o brothers and relatives.

"(3) That the members of the Industrial Workers of the World were clean fighters, and not like the dirty, corruptible scum of the army and navy.

"(4) That it was against the I. W. W. platform (meaning the platform of the Industrial Workers of the World) to injure or kill another fellow worker, but if it was necessary to do this, to gain their rights, that she for one, and every man or woman packing a red card (meaning a membership card in the Industrial Workers of the World) would be willing to sacrifice all they had, their life, if need be, for the cause of industrial freedom.

"(5) That the Irish revolutionists now had a chance to throw off their master (meaning the kingdom of Great Britain and Ireland), while he was weak and unable to stop them, and that the Irish were taking advantage of this condition, and were asserting their rights, and that the I. W. W.s (meaning the members of the Industrial Workers of the World) should do likewise."

"The indictment contains eight counts in all, but a verdict of not guilty was directed by the court as to counts 1, 4 and 8. The second count charges that the foregoing statements were calculated to and intended to cause and attempt to cause, incite and attempt to

incite, insubordination, disloyalty, mutiny and refusal of duty within and among the military and naval forces of the United States. The third count charges that the statements were made with intent to prevent, hinder, delay and obstruct, and attempt to obstruct, the recruiting and enlistment service of the United States. The fifth count charges that the statements were made, and consisted of disloyal, profane, scurrilous, and abusive language about the military and naval forces of the United States, and were made with intent, and were calculated to and intended to bring the military and naval forces of the United States into contempt, scorn, contumely and disrespect. The sixth count charges the same with reference to the flag, while the seventh count charges that the language was calculated and intended to incite, provoke and encourage resistance to the United States, and to promote the cause of its enemies."

The following is an excerpt from brief of defendant in error in case of Marie Equi v. U. S., pages 41-44:

"Admissibility of Testimony.

"It is further contended that the court erred in admitting in evidence certain testimony relative to the actions and statements of the defendant upon other occasions than those charged in the indictment, and in particular, assigns as error the admissibility of that testimony relating:

"(a) To the actions of the defendant upon the occasion of the Preparedness Day parade in Portland, Oregon, on June 3, 1916.

"(b) To the speeches of the defendant at

the Plaza Block in Portland, Oregon, in September and October, 1917, and

"(c) To the speech of the defendant in the I. W. W. Hall at Portland, Oregon, on June 1, 1918.

"In a prosecution for violation of Section III of the espionage act, it is clearly incumbent upon the government to prove, not only that the defendant spoke the words charged in the indictment, but that she spoke them with the specific intent attributed to her in the separate counts of the indictment. . . .

"With the testimony admitted for this special purpose only, the court admitted in evidence, under appropriate instruments, the following testimony:

"(a) Preparedness Day Parade (June 3, 1916).

"Palmer Fales testified that he is an attorney at law residing in the City of Portland; that he was a participant in the Preparedness Parade at Portland on June 3, 1916, marching with the lawyers contingent; that while that body was forming into lines in the neighborhood of Fourteenth and Hall Streets, waiting to march in the procession, he noticed the defendant come in an automobile, in which automobile she carried a banner bearing this legent, or words to that effect: 'Prepare to die,' also another legend that Morgan wanted the war for profit. This banner was about three or four feet long and probably two and a half feet high. (Transcript, page 92.)

"Raymond Sullivan testified that he is an attorney at law residing in the City of Portland and that he was a participant in the Preparedness Parade on June 3, 1916; that he marched with the Knights of Columbus organization; that he first saw the defendant in an

automobile passing ahead of his column; she was then standing up in the car carrying a banner; that he is not positive as to the legend the banner bore, but that it had some reference to Rockefeller and the soldiers, some statement to the effect that soldiers were 'scabs'; that he noticed her returning a little later, but that this time she was not holding up any banner; that her automobile stopped right in front of his column; whereupon a young man by the name of Crowley rushed out and handed her an American flag; that she took the flag, held it up in front of her and tore it into strips. (Transcript, page 99.)

"Thomas F. Crowley testified that he was a soldier in the United States Army, having entered the service on July 25, 1918; that at the time of trial he was stationed at Camp Lewis, Washington; that prior to that time he was a resident of the City of Portland; that he was a participant in the Preparedness Day Parade in June, 1916, marching with the Knights of Columbus division; that while they were in the parade, or waiting to take part in it, he saw the defendant proceeding along in an automobile: that she was standing up in the automobile carrying a banner bearing the legend: 'Prepare to Die'; that he first noticed her going by the column and then a little later coming back; that his company opened ranks to let her go through, when she started to talk about some 'dirty curs' taking her banner away, whereupon the witness handed her a small American flag, saying, 'Here, I will give you a good banner'; that the defendant thereupon said: 'To hell with you and your banner.'

"This testimony was admitted solely for the purpose of proving intent and was received by the court for that purpose only, and in his

instructions to the jury, the court specifically pointed out the purpose for its introduction and how it was to be considered by the jury. (Trans. pp. 144-5.)

"(b) Speeches at Plaza Block (Sept.-Oct., 1917):

"Testimony of certain speeches made by the defendant on the public streets of the City of Portland, at a place known as the Plaza Block, was likewise offered by the government and admitted solely for one purpose, to show the bent of mind and attitude of the defendant, and to thereby aid the jury in determining her purpose and intent in using the language attributed to her in the indictment, in the event the jury was to find such statements were actually made by the defendant.

"With the effect of this testimony thus limited, the court admitted in evidence the following testimony relative to the speeches made by the defendant at the Plaza Block in September and October, 1917:

"John Anderson, a resident of Portland, testified that some time in September, 1917, a military funeral was proceeding south on Third Street outside the Plaza Block in the City of Portland and that some soldiers were marching on each side of the casket; that at that time the defendant was addressing a crowd in the Plaza Block on the corner of Fourth and Main Streets and that while the funeral cortege was passing, the defendant made these utterances as testified to by the witness:

"She pointed at the funeral and said, 'There they go; that's nothing to be proud of, those skunks.'" (Trans., p. 85.)

"The witness further testified that some time in October, 1917, during the second Liberty Loan drive, the defendant was again ad-

dressing a crowd at the Plaza Block and was discussing an advertisement appearing in the Oregonian, wherein one William McRae of the Bank of California, acting for the clearing-house, was offering to lend money to buy bonds; that she commented upon the fact that the banker was not very patriotic, calling him a capitalist and hoped that her hearers were not going to fall for that sort of 'dope'; that she thereupon made the following statement:

" 'This is a rich man's war; it ain't any war for you. We have no quarrel with these German people over there and we have no right to go over and shoot them.' (Trans., p. 86.)

"Dr. J. P. Allen testified that he heard the defendant address a crowd in the Plaza Block in September, 1917, at a time when a military funeral was proceeding along the street, and on that occasion he heard her make remarks concerning it during which she called the mourners, wearing the uniform of the United States soldiers, 'a lot of dirty skunks.' (Trans., p. 90.)

"The witness further testified that in October, 1917, he also heard her deliver a talk at the Plaza Block; that it was during the second Liberty Loan campaign; that she was holding an advertisement appearing in the Oregonian wherein the California State Bank was offering to lend money at 5 per cent to buy bonds, and in referring to this advertisement she asked the 'boys' if they were going to fall for that kind of 'dope'; that on that occasion she also made this statement:

" 'This is not our war—this is the capitalists' war. You can see by the way the bankers are advertising them, want you to pay them more interest than you are getting.' (Trans., pp. 90-1.)

"Russell E. Butler, a police officer of the City of Portland, testified that in the month of September, 1917, he was directed by the Chief of Police to report the I. W. W. meetings at the Plaza Block and to make notes of any seditious utterances against the government; that on three different occasions in the months of September and October, 1917, these meetings were addressed by the defendant, all of which meetings he attended. Among the statements alleged to have been made by the defendant during her speeches on those occasions as testified to by this witness were the following:

"'She spoke about the war, said she was for the war, she wanted to know what the war was for. It was soon after Mr. McAdoo had been here and she spoke about the buying of Liberty Bonds, and that the banks didn't take them any too readily, and wondered why the poor fools—the usual expression was, "Why should you take them, boys?"'

"'And she spoke about the soldiers and said one particular soldier, whose name I don't remember, that is, an ex-soldier, had been arrested as an I. W. W.; said that he had served his entire life in the army, and they had arrested him and put him in jail because he couldn't fight any more. And said considerable about the shipyard strike, and claimed that they had a right to strike then, as war was coming on. Another occasion where she spoke about the army, she said that the ruling class didn't go to war, it was the working class that went to war, and she said: "When you get over there in the trenches, boys, you know who gets stabbed in the guts with the bayonets," and that is about all that I recall at the

present time, the exact words.' (Trans., pp 78-79.)

"Dan Kellaher, a police officer of the City of Portland, testified that on October 14, 1917, he was directed by the Chief of Police of Portland to report any disloyal utterances that might be made by the speakers at that meeting; that the principal speaker at that meeting was the defendant; that there was an audience of a couple of hundred people; that during the course of her remarks she made reference to the Preparedness Parade held in Portland in June, 1916, stating in substance as follows:

" 'They wanted me to kiss that dirty little rag, the American flag, and I would not do it. I would not kiss any flag. Then he said he would thrust it down my throat, but he did not.' (Trans., p. 63.)

"The witness further testified that she also referred to the Liberty Bonds and that the bankers were a little bit shy in subscribing to them, concerning which she made the following statement:

" 'They are pretty wise and they know what they are doing. No, they want you workingmen to take a chance with them.' (Trans., p. 64.)

"The witness further testified to other excerpts from her speech which had been made the subject of a typewritten report by him and to which he resorted to refresh his recollection. In the course of her speech, she stated as follows:

" 'James McDonald made one mistake in life. He served his life for the United States Army until he became physically disabled and they didn't want him any more, and he is not present now because he can't fight. Remember that, boys.

" 'The crowning disgrace is to think that they will take working men to the trenches to fight for them and then try to break up their organizations. What are we fighting for? That is what I would like to know. McAdoo made an appeal while he was here for the working class to buy Liberty Bonds and told them how they could pay so much down and so much a month. Why don't he say to the Dupont Powder Works, who have made sixteen million dollars last year, to divide 50 per cent with the government? No, he won't do that, but they want you workingmen and your son to put on a uniform. He said the bankers were a little bit shy about the Liberty Bonds. These fellows are wise and are supposed to know what they are doing, then why should the working men have to take a chance with them? . . . We have got to get busy and do our little bit to bring about democracy. That's why I am out here. And now they call you unpatriotic. For what? For daring to strike during the war; for daring to have the courage of your convictions in asking for a living wage and better working conditions. The capitalistic class has forced good women to sell their bodies, but their tools, the editors of the papers and the lawyers, they sell their brains and that is a damn sight worse—you will excuse me—they prostitute their brain power for a price. . . .' (Trans., p. 170.)

"Charles Porter, a police officer of the City of Portland, testified that he was directed on October 14, 1917, to report a meeting addressed by the defendant at the Plaza Block and that on that occasion he heard her speak to a crowd of some two or three hundred people and that she was speaking about the war, enlistments and of the ruling classes and that during the

course of this speech she made use of the folloing utterances:

"'It will be you fellows that will get the bayonets in your guts.' (Trans., p. 81.)

"During the summer and early fall of 1917, pending the working out of the elaborate details of the selective service law, it will be remembered that the government was straining every effort to obtain as many recruits and volunteers as possible. It is a matter of common knowledge that recruiting stations were established, posters extensively distributed, public meetings widely held, and a nation-wide appeal made to men of enlistment age to enlist in the Army and Navy. It was while that situation was prevailing that these utterances at the Plaza Block were made.

"(c) Speech at I. W. W. Hall, June 1, 1918.

"Wellington Weiland testified that he was twenty-five years of age; that he entered the military service of the United States on August 6, 1918, and was detailed to the intelligence branch of the service on March 1, 1918; that acting under orders of his superior officer in the intelligence office, Captain Paul Robinson, he had gone to the I. W. W. Hall in Portland on June 1, where at that time he heard Dr. Equi make the following public speech:

"'Well, fellows, I am going to make you a little talk.' She says, 'I have been warned not to talk, but I am going to continue to talk until I am thrown in; that is the way they will shut me up.' She says, 'My partner has been put in for thirty years for talking.' She says, 'This is nothing but a war of capital against labor, a rich man's war.' She says, 'It is not democracy they are attacking at all. I. W. W.ism is

democracy.' Also they were going to get a red flag for the I. W. W. which would have a black cat on it. She says, 'We are going to have that flag and it is the flag we want to stand by.'

"At the time this testimony was introduced, the court expressly limited and qualified the effect of the same, and likewise instructed the jury." (Trans., pp. 141-144.) . . .